UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/789
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 789

Case No. 870: CHANCE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas, on 25 July 1995, Blondel D. Chance, a staff member of the United Nations, filed an application requesting the Tribunal, inter alia:

"...

(i) To find that the Administration denied the Applicant due process for promotion by withholding a post available for promotion purposes during the 1992 promotion review with a view to keeping that post for a preferred candidate who was not at that time eligible for promotion;

(ii) To find that after the Applicant's successful recourse to the Appointment and Promotion Panel for inclusion in the 1992 promotion register, the Executive Office, DESD [Department of Economic and Social Development] acted improperly to influence the Appointment and Promotion Board, contrary to usual procedure, not to endorse the recommendation of the Panel;

(iii) To find that the Respondent's contention that the post in question was redeployed as a result of the ongoing restructuring exercise was a ploy designed to keep the post for a preferred candidate;

(iv) To find that the actions of the Respondent outlined above, in effect, denied the Applicant full and fair consideration for promotion and thereby adversely influenced his seniority in grade and level of remuneration, which caused him moral suffering and professional prejudice.

... To rule that:

...

(b) The Applicant's name be retroactively included in the 1992 promotion G-7 register;

Or, failing that:

(c) The payment of compensation for the period 1 July 1992 until 30 November 1995 which would be the equivalent to the amount [the Applicant would have received] if the Appellant was actually promoted;

(d) The further payment of compensation for the moral suffering and professional prejudice inflicted on the Applicant as a result of the action taken by the Administration."

Whereas the Respondent filed his answer on 6 November 1995;

Whereas, on 1 November 1996, the Tribunal requested the Respondent to provide it with answers to certain questions, which the Respondent did, on 8 and 13 November 1996;

Whereas, on 13 November 1996, the Tribunal requested the Respondent to provide it with certain additional documents, which the Respondent did, on 15 November 1996;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 1 December 1964, on a short-term appointment, as a Messenger at the G-1 level. He received a three-month fixed-term appointment on 23 June 1965. On 23 September 1965, he was given a probationary appointment.

On 1 January 1967, the Applicant was transferred to the Department of Economic and Social Affairs, Office of Technical Assistance Cooperation, Office of the Director, at the G-2 level with a new functional title of Clerk. On 1 June 1967, his appointment became permanent. On 1 July 1967, he was promoted to the G-3 level. On 1 April 1974, the Applicant was promoted to the G-4 level and given the functional title of Senior Clerk. On 1 April 1978, he was transferred to the Executive Office, Department of Technical Cooperation for Development (DTCD). On 1 December 1978, his functional title was changed to Acting Administrative Assistant. On 1 April 1981, he was promoted to the G-5 level. On 1 January 1985, his grade was raised to G-6, as part of the conversion to new classification standards.

In November 1992, in accordance with ST/AI/373 of 23 December 1991 on placement and promotion, the Departmental Promotion Panel (hereinafter the Departmental Panel) for the G-7 level in DTCD reviewed the qualifications of six candidates, including the Applicant, for the G-7 post with the functional title of Personnel Assistant (UNA-39800-E-P-L-001). It recommended another staff member for this post, whom it deemed better qualified to perform some of the duties, though it recognized that the Applicant had been performing some of those functions in DTCD and was capable and deserving of promotion. The Departmental Panel proposed to give the Applicant a special post allowance (SPA) whenever a post became available. The Departmental Panel did not, however, consider the Applicant as having the requisite qualifications for another vacant post, No. UNA-39805-E-P-L-001 (Finance Assistant), that needed to be filled.

In March 1993, the Appointment and Promotion Panel (APP) met to examine candidates in connection with the two G-7 posts (Personnel Assistant and Finance Assistant) in the Department of Development Support and Management Services (DDSMS). It concurred

with the recommendations of the Departmental Panel. The Appointment and Promotion Board (APB) agreed with the recommendations of the APP.

On 24 June 1993, the Director of Personnel issued ST/IC/1993/29 of 25 May 1993, announcing the 1992 G-7 Promotion Register as approved by the Secretary-General. The Applicant's name was not on the list.

By memorandum dated 9 July 1993 to the APP, the Applicant drew its attention to another vacant post, No. UNA-39240-E-P-L-008, in the Under-Secretary-General's Office.

By memorandum dated 22 September 1993, the Applicant instituted a recourse procedure against the decision not to include him in the 1992 G-7 Promotion Register.

On 4 and 11 October 1993, the APP met to review the Applicant's recourse. In light of the information concerning the post No. UNA-45500-E-P-L-001 (formerly post No. UNA-39240-E-P-L-008) submitted by both the Applicant and the representative of DDSMS, the APP considered the Applicant eligible for promotion and recommended him to the APB for inclusion in the 1992 G-7 Promotion Register.

On 22 November 1993, the APB met to examine the report of the APP. Notes made at that meeting indicated that the APB decided not to accept the APP's recommendation to include the Applicant in the 1992 G-7 Promotion Register due to "serious reservations against promoting [the Applicant]", since a "more technical person" was required for the post in question.

In a letter dated 7 December 1993, the Chairperson of Working Group I of the APP, informed the Applicant that "the re-examination of [his] case by the Appointment and Promotion bodies did not reveal that there were sufficient grounds to amend their previous decision [not to include the Applicant's name in the Promotion Register]."

On 26 January 1994, the Applicant wrote to the Secretary-General requesting a review of the decision, communicated to him on 7 December 1993, not to include his name in the 1992 G-7 Promotion Register.

The Joint Appeals Board (JAB) adopted its report on 18 April 1995. Its considerations, conclusions and recommendation read, in part, as follows:

"Considerations

...

The Panel noted that although the Appointment and Promotion Panel had recommended him for promotion, the Appointment and Promotion Board, after reviewing the qualifications of all candidates for the G-7 post available for promotion, had recommended another candidate as better qualified.

The JAB Panel found that no violation of the Applicant's rights had been committed as there was no allegation that the action of the promotion bodies had been influenced by improper considerations.

The Panel came to the same conclusion with respect to the Applicant's claim in connection with subsequent G-7 vacancies to which he was not appointed. In particular, the Panel could not find any evidence to support the Applicant's allegations that a post description was altered for the purpose of rendering the Applicant ineligible, or that posts were deliberately not made available for promotion purposes so as to make the Applicant's promotion impossible.

Recommendation

The Panel, while recognizing the merits of the Applicant as a staff member and fully understanding his conviction that he deserved a promotion to G-7, especially as he was approaching the end of his career, unanimously concluded that there were no grounds for recommending that the Secretary-General change his decision not to include the Applicant in the G-7 Register. It therefore recommends that the Secretary-General uphold his decision."

On 27 April 1995, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

> "The Secretary-General has examined your case in the light of the Board's report, and in accordance with its recommendation, has decided to maintain the contested decision and to take no further action on your case."

On 25 July 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Administration denied the Applicant due process by withholding a post, for which the Applicant was qualified, from the 1992 promotion review with a view to keeping that post for a preferred candidate.

2. The Administration improperly influenced the APB not to endorse the recommendation of the APP.

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to promotion, but only a right to consideration for promotion. The Applicant was properly considered for promotion, and his rights were not violated by his non-selection to the post in question.

2. The decision not to select the Applicant for the post was not vitiated by extraneous factors.

The Tribunal, having deliberated from 29 October to 21 November 1996, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Respondent dated 27 April 1995. That decision adopted a unanimous Joint Appeals

Board (JAB) recommendation that no further action be taken with respect to the Applicant's non-promotion to the G-7 level. The Applicant claims that the Administration denied him due process by withholding a post available for promotion, in order to keep that post for a preferred candidate. The Applicant also argues that the Appointment and Promotion Panel's (APP) recommendation for the Applicant's promotion was not endorsed by the Appointment and Promotion Board (APB), contrary to usual procedure. He also asserts that he was denied full and fair consideration for promotion. Accordingly, the Applicant asks the Tribunal to uphold the recommendation of the APP for his retroactive promotion, or alternatively, to grant him compensation for damages for moral suffering and professional prejudice.

II. The issue before the Tribunal is whether the Administration's decision not to promote the Applicant to a G-7 level post violated his rights. The Tribunal must, therefore, examine whether any infringement or violation of the rights of the Applicant under the Staff Rules and Regulations or denial of due process had occurred in connection with the non-inclusion of his name in the 1992 G-7 Promotion Register.

III. It must be stated at the outset that the Applicant has no right to promotion, but only a right to consideration for a promotion. The Respondent submits that the Applicant was given full and fair consideration for the post for which he applied. The Applicant invoked a recourse procedure against the decision not to include his name in the promotion register. His recourse was rejected only after careful consideration.

The Tribunal has consistently held that "qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy"

(Judgement No. 312, Roberts, 1983). In addition, the Tribunal has recognized the wide discretion that the Secretary-General has in promoting staff members (Judgement No. 362, Williamson, 1986).

IV. It appears to the Tribunal that, in this case, the promotion exercise in question took place at the time of restructuring, which involved identifying posts for redeployment. The Respondent claims that, as a result of restructuring, the post to which the Applicant refers - UNA39240EPL008 - was redeployed to another unit with a new job description. Unfortunately, it appears that the Applicant did not have the necessary qualifications to fill this new post. It is within the discretionary authority of the Secretary-General to withhold a post from promotion in the course of restructuring. Unless the Applicant can prove prejudice or improper motivation on the part of the Respondent when this decision was made, the Tribunal can only conclude that the Applicant's rights were not violated.

V. It is the responsibility of the person alleging prejudice or improper motivation to produce convincing evidence in support of these allegations. The Applicant states that he was denied the promotion because there was a ploy to keep the post for another staff member. The Tribunal has reviewed the material before it and is unable to conclude that extraneous factors were involved in denying the Applicant's promotion. The Tribunal could not find any evidence to support the Applicant's allegations that the post description was altered or that the post was deliberately not made available for promotion in order to deny him a promotion. In this, the Tribunal concurs with the JAB presentation. The Tribunal concludes that the Applicant has not sustained his burden of proof.

VI. The Applicant argues that the APB acted contrary to its usual practice of endorsing the recommendation of the APP when it

recommended the non-inclusion of his name in the 1992 G-7 Promotion Register. The Tribunal has not found that such a practice exists. The APP makes recommendations. It is in the APB's discretion whether to accept them. In this connection, the APB, after reviewing the qualifications of all candidates for the G-7 post, recommended another candidate as better qualified. The Tribunal finds that the Applicant's rights have not been violated by the promotion bodies. The Tribunal therefore rejects the application in its entirety.

VII. The Tribunal is sympathetic to the fact that the Applicant has devoted his career to the United Nations and thus sincerely believes himself deserving of this promotion. The Tribunal notes, in this regard, that the Applicant has been promoted to the G-7 level with effect from 1 September 1995.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/790
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 790

Case No. 873: AKIL

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Francis Spain; Ms. Deborah Taylor Ashford;

Whereas, at the request of Akil Eisa M. Akil, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 August 1995, the time-limit for the filing of an application to the Tribunal;

Whereas, on 24 August 1995, the Applicant filed an application requesting the Tribunal, inter alia:

"...

(a) To rescind the decision of the Secretary-General rejecting the Applicant's candidacy for the D-2 post of Deputy Executive Secretary of ESCWA [United Nations Economic and Social Commission for Western Asia];

(b) To order that the Applicant's candidacy for promotion to the D-2 level be given proper consideration;

...

(f) To find and rule that the selection process for the D-2 post of Deputy Executive Secretary was improperly motivated, tainted by extraneous considerations and marred by irregularities in procedure;

(g) To award the Applicant appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by th Applicant as a result of the Respondent's actions or lack thereof;

(h) To fix [pursuant] to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be pa in lieu of specific performance at three years' net ba pay, in view of the special circumstances of the case;

(i) To award the Applicant as costs the sum of $6,000.00 i legal fees and $500.00 in expenses and disbursements."

Whereas the Respondent filed his answer on 15 December 1995

Whereas the Applicant filed written observations on 22 January 1996;

Whereas, on 21 October 1996, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas, on 28 October 1996, the Tribunal requested the Respondent to provide it with answers to certain questions, which did, on 31 October and 5 and 6 November 1996;

Whereas the facts in the case are as follows:

The Applicant joined the service of the Organization on 1 April 1974, on a three-month fixed-term appointment as a Researc Assistant in the Agriculture Unit of ESA, Economic and Social Commission for Western Asia (ESCWA), Lebanon, at the GS-6, step I level. His appointment was extended for three month periods, unti 1 January 1975, when he was given the post of Associate Social Affairs Officer, at the P-2, step I level, in the Social Developme and Human Settlement Division of ESCWA. On 1 June 1975, his appointment became probationary and, on 1 January 1977, permanent. On 1 April 1978, his functional title was changed to Social Affair Officer, and on 1 April 1981, he was promoted to the P-4 level. H was transferred to Iraq with effect from 1 May 1982. On 1 October 1986, he was promoted to the P-5 level, and on 1 April 1991, he wa

transferred to Amman, Jordan, and reassigned to the Programme Planning and Coordination Division (PPTCO). On 1 September 1992, the Applicant was promoted to the D-1 level, as Chief of PPTCO. On 31 March 1994, he became Chief of the Social Development Division at ESCWA.

On 16 November 1991, the post of Deputy Executive Secretary, ESCWA, became vacant. A vacancy announcement No. 91-E-ECW-067-BG, with a 27 January 1992 deadline for submission of applications from both internal and external candidates, was circulated. The announcement included the remark "Qualified women are encouraged to apply."

On 28 July 1993, the Acting Chief, Personnel, forwarded to the Chief of Administration, ESCWA, "the list of possible candidates for the post of Deputy." The list included D-1 staff members of ESCWA ranked by seniority in grade, together with copies of their fact sheets. The list was as follows:

"Name	In Grade Since	Current Level and Step
...	10/1987	D-1/VI
...	10/1987	D-1/VII reach age of retirement in December
...	10/1989	D-1/IV
...	9/1991	D-1/VIII
[the Applicant]	9/1992	D-1/IV
[Ms. X]	1/1993	D-1/IV"

Added also was the name of the Chief of the Joint Food and Agriculture Organization (FAO)/ESCWA Agriculture Division, an FAO staff member at the D-1 level.

On 5 August 1993, the Executive Secretary, ESCWA, sent a memorandum to the Secretary-General in which he proposed three candidates for the D-2 post, listed in order of preference: The Applicant (D-1, step IV), Ms. (X) (D-1, step IV) and Mr. (Y) (D-1, step II). An evaluation of the Applicant was appended.

On 5 September 1993, in response to a request from the Office of Human Resources Management (OHRM), the Acting Chief of Personnel

forwarded the Executive Secretary's evaluations of Ms. (X) and Mr. (Y). She also sent an evaluation of the former Deputy Executive Secretary, whose name the Executive Secretary wished to add to the list.

On 20 September 1993, in response to a further request, the Acting Chief of Personnel transmitted to OHRM copies of fact sheets, performance evaluation reports (PERs) and other relevant documentation of Ms. (X) and the Applicant, as well as copies of the former Executive Secretary's fact sheet, P-11 and curriculum vitae (C.V.), and copies of Mr. (Y)'s probationary performance appraisal report and C.V. The next day, she forwarded to Headquarters a further evaluation of the Applicant.

By cable of 7 October 1993, the Director of Personnel, OHRM, informed the Executive Secretary that the Secretary-General had decided to appoint Ms. (X) as Deputy Executive Director.

Meanwhile, the Applicant had come into possession of a copy of a handwritten, undated note, apparently written by the Acting Chief of Personnel. The note, entitled "Ms. X", says that Ms. (X)'s promotion to D-1, shown in the fact sheet as 16 January 1993, should be corrected to 1 February 1993, and that other corrections needed to be made to her steps in grade. The note concludes: "to redo the whole thing after her selection to D-2 ..."

On 3 November 1993, the Applicant requested the Secretary-General to review the decision of 7 October 1993 not to select him for the D-2 post of Deputy Executive Secretary of ESCWA.

On 4 February 1994, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 2 February 1995. Its considerations, conclusions and recommendations read, in part, as follows:

"Considerations

...

15. In this context, the Panel first considered whether there was any evidence of bias or discrimination against the Appellant. The Panel felt that, if there had been obvious disparity in qualifications as between Ms. [X] and the Appellant, this might have been considered as evidence to support the latter's allegations. In the Panel's view, there was no such disparity; both candidates appeared, on the record, to be qualified. Having reviewed the material submitted by, or on behalf of, the Appellant, the Panel could find no evidence to support the allegations of bias or discrimination on the basis of gender or of nationality.

16. The Panel felt, however, that if the gender of the candidate to be selected for the post played a role in the selection, this should have been made clear by the Administration stating that it had decided to appoint a woman in the light of the policy established by the Secretary-General on the promotion of women to higher positions.

17. The Panel considered at somewhat greater length the role of [the Acting Chief, Personnel Section] and of her hand-written note. It noted that the 'misinformation' supplied to [the Executive Secretary] and, ultimately, to Headquarters by [the Acting Chief, Personnel Section] concerned the date of Ms. [X]'s promotion to D-1 and her periods of leave without pay. The promotion date was given in ESCWA's own files as being one month earlier than it was in fact; the earlier date was that used by [the Acting Chief, Personnel Section]. The Panel concluded that one month discrepancy and the short period of LWOP [leave without pay] were too trivial to have had any impact on an evaluation of a candidate's qualifications for a senior post.

18. As to the significance of the final phrase in [the Acting Chief, Personnel Section]'s note (...), the Panel took the common sense view that [the Acting Chief, Personnel Section] was too junior to be in a position to predict the outcome of the Secretary-General's review. The Panel thus found no evidence to support the Appellant's conspiracy theory, no proof of extraneous considerations having entered into the evaluation of the candidates, and no reason to believe that the Secretary-General had abused his discretionary powers. The Panel also reviewed the material submitted to the Senior Review Group under cover of [the Director of Personnel, OHRM]'s memorandum of 24 September 1993 and found no evidence that relevant information concerning the Appellant and the other candidates had been omitted or misrepresented.

...

Recommendations

20. The Panel was troubled, not only by the substance of the appeal, but by the manner of its presentation by, and on behalf of the Appellant. It noted the unusually strong language in the Respondent's reply, and recommends that the Secretary-General take appropriate action to avoid a repetition in the future.

21. The Panel makes not other recommendation with respect to this appeal."

On 2 March 1995, the Under-Secretary-General for Administration and Management informed the Applicant as follows:

"The Secretary-General has examined your case in the light of the Board's report. The Secretary-General has taken note of the Panel's findings on the substance of your appeal and has decided, accordingly, to maintain the contested decision and to take no further action on your case. The Secretary-General shares the Panel's concern expressed in paragraph 20 of its report and will bring it to the attention of the appropriate office for action as necessary."

On 24 August 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was denied full and fair consideration for promotion.

2. The selection process for the post in question was improperly motivated, tainted by extraneous considerations and marred by irregularities in procedure.

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to promotion, but only a right to consideration for promotion. The Applicant was properly

considered for promotion, and his rights were not violated because he was not selected for the post in question.

2. The decision not to select the Applicant for the post in question was not vitiated by extraneous factors.

The Tribunal, having deliberated from 24 October to 21 November 1996, now pronounces the following judgement:

I. The Applicant claims that he was not fully and fairly considered for the post of Deputy Executive Secretary of ESCWA and requests rescission of the decision to appoint another candidate to that position.

The Applicant also submits that prior to the selection process, the Administration had already decided to appoint a given candidate who did not meet the requirements for the post as set forth in the vacancy announcement.

The Tribunal requested a copy of the "records, minutes or reports of the Senior Review Group, which made recommendations to the Secretary-General on the candidature for the post of Deputy Executive Secretary" of ESCWA. These documents were examined by the Tribunal. It is satisfied that the Applicant's candidature was fully and fairly considered.

In particular, the Tribunal noted the report of the Senior Review Group, dated 24 September 1993, stating that "both [the Applicant] and Ms. [X] were qualified for the post". This clearly shows that the Applicant's candidature was not overlooked.

II. The Tribunal, in its Judgement No. 447, Abbas (1989), ruled that the onus probandi that a given candidate has been fully and fairly considered for a post rests with the Administration. The Tribunal finds that, in this instance, the Administration has discharged its obligation.

The report of the Senior Review Group recommends the female staff member on the basis of the need to "increase the representation of women at the senior level". The Tribunal finds that such a recommendation is in conformity with the general policy of the United Nations. Consequently, the Applicant cannot claim that his rights were violated.

III. The Applicant also claims that, as early as April 1993, the Secretary-General intended to appoint an Arab woman to the post and that the "the Secretary-General's intention was made known to [the] Chief of the Division of Administration at ESCWA ... and to [the] Executive Secretary of ESCWA". The Tribunal also noted the assertion that "... [the then Director of Personnel, OHRM,] had told [the Executive Secretary], in the presence of ... [the then Information Officer at ESCWA] that he had since identified ... [the Chief of the Division of Social Development and Population at ESCWA] as the most suitable Arab female candidate". In order to ascertain the accuracy of these allegations, the Tribunal requested written testimony from the persons mentioned by the Applicant.

The former Director of Personnel denied having been present at the meeting referred to by the Applicant. The Information Officer at ESCWA did not recall the episode. The Executive Secretary asserts that the Director of Personnel never transmitted any suggestion from the Secretary-General. Finally, the Director of Personnel testified that "it is not true that I 'gave advice' to [the Executive Secretary] that 'the Secretary-General wanted a female Arab candidate for the D-2 post' although he also adds that he did emphasize that "in filling the vacant D-2 post every effort should be made first to find a woman candidate ..."

IV. In the view of the Tribunal, these statements, even if they show that there existed a certain preference for a female candidate, are not sufficient to offset the evidence that the Applicant was

fully and fairly considered for the post. They also show that the post was not awarded to the female candidate as a result of prejudice or any other extraneous motive.

V. The Applicant further claims that the selected candidate fell short of the requirements of the vacancy announcement, as her curriculum vitae did not show that she held an "advanced university degree in the field of economics or business administration".

In this respect, the Tribunal notes that, for the requirement of an advanced university degree, there can be substituted, in the words of the vacancy announcement, a "relevant specialty such as international relations with substantial emphasis on economics", a requirement that the other candidate met, according to her curriculum vitae.

VI. For the foregoing reasons, the Tribunal rejects the application in its entirety, including the Applicant's request for costs.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Francis SPAIN
Member

Deborah Taylor ASHFORD
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary

AT

UNITED
NATIONS

Administrative Tribunal

Distr.
LIMITED

AT/DEC/791
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 791

Case No. 875: KARMOUL

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Francis Spain; Ms. Deborah Taylor Ashford;

Whereas, at the request of Akram J. Karmoul, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 March, 30 June and 30 September 1995, the time-limit for the filing of an application to the Tribunal;

Whereas, on 15 September 1995, the Applicant filed an application containing, inter alia, the following pleas, requesting the Tribunal:

"8. ...

(a) To find that the administrative decision not to renew the Applicant's fixed-term appointment with ESCWA [the United Nations Economic and Social Commission for Western Asia] beyond its expiration on 18 October 1993 was irreparably flawed by various forms of abuse of power (détournement de pouvoir),

(b) To order the Secretary-General to grant to the Applicant, with retroactive effect, a further two-year fixed-term appointment with ESCWA,

(c) Alternatively, should the Secretary-General decline to comply with such a decision, to compensate the Applicant for the violation of his rights as well as for the

denial of his pension benefits to which he would have become entitled one year after his improper separation from United Nations service,

(d) In either case, to award to the Applicant compensation for the slander to which he has been subjected and for the moral and physical suffering to which he and his family have been exposed as a result of the glaring abuse of power by the ESCWA Administration in the present case."

Whereas the Respondent filed his answer on 7 November 1995;

Whereas the Applicant filed written observations on 10 March 1996;

Whereas the facts in the case are as follows:

The Applicant, a Jordanian national, entered the service of the United Nations Economic and Social Commission for Western Asia (ESCWA) at the ESCWA/United Nations Organization for Industrial Development (UNIDO), Industry Division, on 19 October 1989, on an 11 month fixed-term appointment at the D-1 level. His appointment was extended successively for periods of 13 months, three months and one year and nine months, until 18 October 1993. On 18 October 1991, the Applicant's functional title became Chief, Joint ESCWA/UNIDO Industry and Technology Division.

By a letter dated 12 September 1993, the Applicant was informed by the Chief, Division of Administration, that the Executive Secretary had decided not to recommend the extension of his fixed-term appointment. On 13 September 1993, the Applicant requested the Secretary-General to review this decision. In a memorandum dated 11 October 1993, the Director of Personnel, Office of Human Resources Management at Headquarters, asked the Executive Secretary to reconsider his decision.

On 17 October 1993, a meeting took place attended, inter alia, by the Executive Secretary and the Applicant. A note containing the following was prepared on the same date:

"The Executive Secretary referred to a study prepared in Jordan which was regarded as technically unsatisfactory by the Government of Jordan. He also reiterated the allegation related to [the Applicant's] use of the Division's secretaries for personal work related to his private business ... The Executive Secretary reiterated his final position and wished [the Applicant] luck ..."

On 18 October 1993, the Chief, Division of Administration, ESCWA, confirmed to the Applicant his separation from service.

By a letter to the Acting Chief of Personnel, dated 21 October 1993, the Applicant disputed the content of the note of the 17 October 1993 meeting, stating that he was not aware of such a study on Jordan and had not participated in the preparation of any such study.

On 21 January 1994, the Applicant lodged an appeal with the Joint Appeals Board (JAB) against the administrative decision not to renew his fixed-term appointment. The JAB adopted its report on 17 August 1994. Its conclusions and recommendations read as follows:

"...

Conclusions and Recommendations

24. The Panel concluded that the decision not to renew the Appellant's contract did not violate his rights, including his right to due process.

25. The Panel also concluded that under the terms and conditions of the Appellant's employment, he had no right to the renewal of his appointment and that he was not given any reasonable expectancy of continued employment by the Organization.

26. Accordingly, the Panel recommends that the Appeal be rejected."

On 24 August 1994, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

> "The Secretary-General has re-examined your case in the light of the Board's report and concurred with the Board's unanimous recommendations. The Secretary-General has decided, therefore, to reject your appeal."

On 15 September 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The reason given to the Applicant for the non-renewal of his appointment was specious and untruthful and, therefore, vitiated the contested decision.

2. The Executive Secretary was biased against Jordanian nationals, as was documented by Jordanian newspaper articles.

Whereas the Respondent's principal contentions are:

1. The Applicant's fixed-term appointment carried no expectancy of renewal after its expiration date.

2. The Applicant has adduced no evidence of prejudice or improper motivation as a basis for the non-renewal of his appointment and has therefore failed to discharge his burden of proof.

The Tribunal, having deliberated from 24 October to 21 November 1996, now pronounces the following judgement:

I. The Applicant worked for the United Nations Economic and Social Commission for Western Asia (ESCWA) under a succession of fixed-term contracts.

On 12 September 1993, he was informed that the Executive Secretary had decided not to renew his fixed-term contract after 18 October 1993, its date of expiration.

The letter from the Chief, Division of Administration, conveying this information to the Applicant, added that "this situation has been created following the decision taken by the Executive Secretary, in consultation with the Secretary-General, that [ESCWA] undergo a recycling of its human resources, with a view to continuing energizing its secretariat."

On 17 October 1993, i.e., one day before the date of expiration of the Applicant's contract, the Applicant met with the Executive Secretary. According to the Note for the file signed by the Acting Chief of Personnel, in the course of this meeting "[the Applicant] inquired about the reasons for maintaining the [non-renewal] decision." The Executive Secretary referred to a study prepared on Jordan which was regarded as technically unsatisfactory by the Government of Jordan. He also reiterated the allegation related to the Applicant's use of the Division's secretaries for personal work, related to his private water company.

II. The Applicant claims that, in view of the circumstances, the administrative decision not to renew his fixed-term contract "was irreparably flawed by various forms of abuse of power (détournement de pouvoir)."

Before considering this allegation, the Tribunal bore in mind the principle clearly expressed in staff rule 104.12(b) and in the letters of appointment, that fixed-term contracts carry no expectancy of renewal. Furthermore, according to the Tribunal's jurisprudence, good performance does not create a legitimate expectancy of renewal.

Although, therefore, the Administration has the discretion not to renew a fixed-term contract, such discretion must be exercised exclusively in the interest of the Organization. The Respondent's decisions can be challenged by staff members claiming that non-renewal was not effected in the interest of the Organization but for other motives.

III. The Tribunal has held on various occasions, following its Judgement No. 142, Bhattacharyya (1971), that cases involving the non-renewal of fixed-term contracts should take into consideration all the circumstances surrounding the non-renewal. The Tribunal has, therefore, to determine, having examined the different circumstances, whether the contested decision in this case was taken in the interest of the Organization.

IV. The Tribunal examined the different reasons mentioned in connection with the non-renewal of the Applicant's fixed-term contract. The first reason was the intended recycling of human resources in ESCWA. This recycling was allegedly decided by the Executive Secretary in consultation with the Secretary-General. No evidence has been submitted either to show that a plan of comprehensive recycling had been approved or that it followed consultations with the Secretary-General. On the contrary, the report on the Programme and Administrative Practices of the Regional Commission for Africa and Western Asia submitted by a team of the Office of Inspections on 16 November 1993, included the following statement:

> "The team noted that ESCWA had initiated a process of staff replacement which, as an initial step, resulted in the separation or proposed separation, of a number of staff through non-extension of their appointments ... However, the non-extension of the appointments referred to did not appear to respond to any defined project of quality improvement or indeed to any other discernible pattern."

Furthermore, on 11 October 1993, a few days before the Applicant separated from service, the Director of Personnel requested the Executive Secretary to review his decision "as reasons put forth for non-renewal are not particularly sound." The Director of Personnel did not mention the recycling plan.

V. During the 17 October meeting between the Applicant and the Executive Secretary, two further reasons were given for the non-renewal of the contract. The first was the study prepared on Jordan which was regarded as unsatisfactory by the Jordanian Government. The Applicant denies having been in any way connected with such a study and even contests its existence. No evidence to the contrary has been submitted by the Respondent.

The other reason invoked was the alleged use by the Applicant of the Office's secretaries for work related to the Applicant's private business. In this respect, the Applicant was informed on 15 November 1993, roughly a month after his separation, that the Administration had been "able to retrieve from the PC Directory of the Industry Division a part of a document which is in direct relation to your private business." The Chief, Division of Administration, added that "[the Applicant's] engagement in this outside occupation, using in addition the resources of the Division, is contrary to the expectations from a United Nations staff member ..."

The Applicant asserts, in response to this accusation, that the document in question was a paper written by his daughter for the University of Jordan. In support, the Applicant has submitted the original document typewritten by his daughter, adding that "at [the Applicant's daughter's] request, a secretary in the Industry Division of ESCWA had kindly agreed to transfer to diskette, a procedure that does not require more than one or two minutes." The Respondent does not contradict these assertions.

VI. In view of the above, the Tribunal finds that these circumstances point to the existence of animosity against the Applicant. Such animosity constitutes an extraneous factor sufficient to suggest an inference that the decision not to renew the Applicant's fixed-term contract was based on personal motives and was not in the best interests of the Organization.

VII. The Applicant also alleges that he had a legitimate expectancy that his contract would be renewed, principally based on the 11 October 1993 letter from the Director of Personnel to the Executive Secretary. The Tribunal has examined that letter and finds that no expectancy of renewal could have arisen.

VIII. Having found that the non-renewal of the Applicant's fixed-term contract was tainted by extraneous motives, the Tribunal has decided to award the Applicant compensation.

IX. For the foregoing reasons, the Tribunal orders the Respondent to pay the Applicant $5,000.

X. All other pleas are rejected.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Francis SPAIN
Member

Deborah Taylor ASHFORD
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/792
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 792

Case No. 877: RIVOLA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas at the request of Gisele Rivola, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 30 June 1995, the time-limit for the filing of an application to the Tribunal;

Whereas, on 27 June 1995, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 11 October 1995, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal, inter alia:

"... to order:

B. The cancellation of the memorandum dated 22 March 1991 of the Chief of Personnel (...) establishing the grade of my post at the G-4 level.

C. The administrative implementation following from the memorandum of the Chief of Personnel of 8 December 1989 (...) informing me of the 'results of the job classification' and annexing the new job description of the G-5 post.

Retroactive implementation of that classification to 1 January 1995, in accordance with the circular/memorandum of the Executive Secretary dated 20 March 1990 (...)

D. The payment of compensation in the amount of US$ 238,000 to cover the loss of salary, pension rights and the moral injury suffered."

Whereas the Respondent filed his answer on 9 August 1996;

Whereas, on 1 November 1996, the Tribunal requested the Respondent to provide it with answers to certain questions, which he did, on 5 November 1996;

Whereas, on 11 November 1996, the Applicant provided her comments thereon;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 24 June 1980, as a Clerk in the International Trade Center (ITC), UNCTAD/GATT, at the G-2 level, on a short-term appointment. She served on short-term appointments until 5 September 1983, when she was granted a one-year fixed-term appointment as a Clerk-Typist, at the G-3, step VI level, in the ITC, Office for Africa Division, Division of Technical Cooperation (DTC). On 7 May 1984, her functional title was changed to that of Secretary, and on 5 September 1984, her fixed-term appointment was extended through 30 September 1986. On 1 January 1986, the Applicant was promoted to the G-4 level. The Applicant's fixed-term appointment was extended for three years, until 30 September 1989. It was then further extended for five years, until 30 September 1994, and subsequently through 31 January 1996.

On 7 October 1988, ITC/CIR/121 was sent to all General Service staff members. The Circular noted that, in view of the change in content of many General Service posts as a result of the introduction of new technology, and organizational changes and diversification within ITC, a post classification study was being

initiated. Pursuant to this Circular, a Classification Committee, composed of three members, was to finalize the job description for each post and then analyze and classify the post. The proposed grade of each post would then be submitted to the Chief, Personnel Administration Section (PAS), who would inform the incumbent of the post of the classification. A proceeding for reclassification was also established in cases where the incumbent disagreed with the classification of the post.

In 1987 and 1988, the Chief of the Office for Africa sent several memoranda to the Director of DTC and to the Deputy Executive Director of ITC, asking them to upgrade the Applicant's post and to promote her on the basis of the functions that she was performing.

In a memorandum dated 8 December 1989, the Chief, PAS, informed the Applicant that, following the Job Classification Exercise of General Service posts, the Joint Post Classification Committee had classified the post she encumbered at the G-5 level.

In a circular memorandum dated 20 March 1990, the Executive Director, ITC, informed all General Service staff at Headquarters of the status of the classification exercise initiated pursuant to ITC/CIR/121 of 7 October 1988.

On 22 March 1991, the Chief, PAS, informed the Applicant that, following a comprehensive classification of General Service posts in ITC, the Executive Director had determined that the grade of the post she encumbered was in fact G-4, which corresponded to her individual grading. Attached to the communication was a job description of the Applicant's post. She was also informed of the possibility of requesting a review of this decision by the Joint Staff Management Recourse Committee for General Service classification as provided in paragraph 3 of ITC/OED/INF/358.

On 9 April 1991, the Applicant requested further information from the Chief, PAS, in order to prepare her request for review of the classification decision. On 18 April 1991, the Applicant requested the Executive Director, ITC, to review the contested

decision. She asked that a Personnel Action be issued to implement retroactively, with effect from 1 January 1989, the initial decision of the Classification Committee to classify her post at the G-5 level. Furthermore, she stated that the job description she had been sent by the Chief, PAS, did not correspond to her actual duties, which were more numerous and important than the duties described therein.

On 4 June 1991, the Applicant wrote to the Executive Director, to the Chief, PAS, and to the Director, Division of Administration, asking when they would implement the decision to promote her to the G-5 level, which was supposed to have been effective from 1 January 1989. Discussions thereupon ensued between the Applicant and the Chief, PAS.

In a memorandum dated 1 August 1991, addressed to the Applicant, the Chief, PAS, pointed out that her post had been submitted to three different classification exercises: the first, in 1989, by a Classification Committee, which had recommended that her post be classified at the G-5 level; the second by Classification Consultants, and the final one by the second Classification Committee, which had recommended that her post be classified at the G-4 level. The Chief, PAS, explained that, on the basis of these three recommendations, the Executive Director, ITC, had approved the classification of the post at the G-4 level.

In a reply dated 16 August 1991, to the Executive Director, the Applicant stated that she had never been made aware of all the different steps in the process of classification of her post. The memorandum dated 8 December 1989, whereby she had been informed that her post had been reclassified to the G-5 level, referred to the results of the classification exercise, not merely to recommendations that would later require confirmation. Moreover, her expected promotion to the G-5 level had not been questioned until April 1991, with the consequence that she had not applied to vacant G-5 posts in reliance on her forthcoming promotion.

In a memorandum dated 14 October 1991, the Chief, PAS, informed the Applicant that no administrative measure could be taken before the Recourse Committee finished reviewing all the cases pending before it.

On 26 December 1991, the Applicant wrote to the Chief, PAS, and reiterated her request for retroactive implementation of her promotion to 1 January 1989.

On 30 January 1992, the Chief, PAS, informed the Applicant of the recommendation of the Recourse Committee to reject her appeal and of the subsequent decision of the Executive Director to accept this recommendation.

On 27 March 1992, the Applicant requested the Secretary-General to review two contested decisions, i.e. the non-implementation of the 1989 upgrading of her post to the G-5 level and the subsequent downgrading of the same post in 1992. Having received no reply within the specified time-limit, the Applicant lodged an appeal with the Geneva Joint Appeals Board (JAB) on 29 June 1992.

On 1 January 1993, the Applicant was promoted to the G-5 level, upon the recommendation of the UNCTAD/GATT Appointment and Promotion Board.

On 14 November 1994, the JAB unanimously adopted its report. Its conclusions and recommendations read, in part, as follows:

> "40. The Panel concludes that while it cannot find evidence to support the Appellant's claim that the Administration has discriminated against her in the course of the reclassification exercise, the Administration has acted in a callous manner, and that the lack of due process has caused a moral prejudice to the Appellant.
>
> In the light of the above, the Panel considered recommending that the Appellant be given two within-grade salary increments as a compensation for the moral prejudice she has suffered. However, the Panel noted that the Appellant has already reached step 11 of the G-5 level and that consequently this recommendation could not be applied.

> Under the circumstances, the Panel recommends that the Appellant be compensated by an amount equivalent to two months of her current net base salary.
>
> The Panel makes no further recommendation in support of this appeal."

On 29 November 1994, the Secretary-General transmitted to the Applicant a copy of the JAB report and informed her as follows:

> "The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's conclusion that it did not find evidence to support your claim that the Administration discriminated against you in the course of the reclassification exercise. He has also taken note of the Board's concerns over the handling of your case and its recommendation that you be given compensation.
>
> The Secretary-General has decided to accept the recommendation of the Board that you be compensated an amount equivalent to two months of your current net base salary."

On 11 October 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The administrative decision to reclassify the Applicant's post to the G-4 level after it had been classified as a G-5 post was arbitrary and contradicted established procedures.

2. The decision to reclassify the Applicant's post back to the G-4 level was also discriminatory since all the other promotions given at the same time as the Applicant's were maintained.

Whereas the Respondent's principal contentions are:

1. The classification of the Applicant's post at the G-4 level was a proper exercise of administrative discretion and the Applicant's due process rights were not violated.

2. The decision to classify the post in question at the G-4 level was not vitiated by extraneous factors. The Applicant has not

discharged the onus placed upon her to establish prejudice or improper motive.

3. The Applicant would not have been entitled to an automatic promotion to the G-5 level, even if the post that she encumbered had been classified at a higher level.

4. The Applicant is not entitled to compensation in addition to what she has already received.

The Tribunal, having deliberated from 29 October to 21 November 1996, now pronounces the following judgement:

I. The issue before the Tribunal is whether the Administration's decision to classify the Applicant's post at the G-4 level and the manner in which that decision was communicated to the Applicant were vitiated by lack of due process and improper motives, in violation of her rights.

II. In order to properly evaluate this case, the way in which the Respondent's decision was reached must be reviewed. The reclassification of the Applicant's post was conducted within the framework of an overall review of post classifications in the Applicant's division. The motivation behind this reclassification was that, in the space of a few years, operations had trebled, whereas the number of staff remained almost the same, resulting in a considerable increase in the workload.

III. The Applicant was informed of the reclassification of her post in the following manner. On 8 December 1989, the Chief, PAS, informed the Applicant that the "final draft job description for the post occupied by you [has] been classified at the G-5 level." In a circular dated 20 March 1990, the Executive Director advised all General Service staff that the Classification Committee had already evaluated 77 out of 123 posts. He also announced that he had

employed a classification expert to "review ... the General Service study and for the preparation of proposals for the comprehensive implementation of job classification throughout ITC."

On 29 October 1990, the Executive Director further informed all General Service staff that the Classification Committee had completed its work and that, following his approval, the staff would be informed of the level of their posts.

On 22 March 1991, the Chief, Personnel Administration Section, informed the Applicant that the Executive Director had "determined that the grade of the post that you occupy is to be established at the G-4 level."

IV. It appears to the Tribunal that the methodology used by the Administration in the classification procedure lacked the basic elements of fairness and verged on the arbitrary.

According to ITC/OED/INF/358, dated 14 May 1990, the review announced by the Executive Secretary on 20 March 1990 through ITC/OED/INF/358, was to be conducted according to ITC/CIR/121 with the modifications included in ITC/OED/INF/358. The Tribunal had to determine whether these procedures were duly followed. To this end, the Tribunal requested the Respondent to inform it how such procedures were observed. The answer provided by the Respondent failed to address the points contained in the Tribunal's question.

As a consequence, the Tribunal lacks evidence that would show that the relevant procedures have been followed. However, the very scant evidence pointed towards the existence of departures from the established procedures. For instance, paragraph 2 (1) requires that the reclassification should be discussed with directors of divisions. According to the expressions of the Director of the Division of Technical Cooperation (DTC) on 22 April 1991 and of the Applicant's supervisors on 6 July 1993, the new review process was "finalized without the approval of either the Chiefs of office or myself". The Tribunal concurs with the Director of DTC, who

strongly criticised this lack of consultation and who emphasized that the entire reclassification exercise lacked credibility.

Furthermore, the decision to downgrade the classification to the G-4 level did not take into account that for 16 months, that is, between 8 December 1989 and 22 March 1991, the Applicant relied on the classification that had been communicated to her in December 1989. In addition, the Classification Committee, in classifying the Applicant's post, proceeded to do so by analogy with other posts in the division without taking into account that her post had a particular specification which distinguished it from the other posts in the division. Lastly, it is not clear to the Tribunal why all the staff members whose posts were upgraded during the general classification were promoted, with the exception of the Applicant.

The Tribunal also notes that the inadequacy of the methodologies used in the classification process is further evidenced by the fact that it took four years to review just 123 posts.

V. The Respondent argues that the classification of the Applicant's post was proper and did not violate her due process rights. He points out that her post had been submitted to three different classification exercises which resulted in the recommendation that the Applicant's post be classified at the G-4 level. The Tribunal believes that this argument is flawed. At no time, during the 16 months following the confirmation of her classification at the G-5 level, was the Applicant personally informed that her post was being re-examined. She was never given the opportunity to respond to the classification recommendations. Furthermore, the Applicant, who believed that her classification at the G-5 level was confirmed, lost the opportunity to apply for vacant G-5 posts.

VI. It is clear to the Tribunal that it cannot substitute its judgement for that of the Respondent in job classification matters (Judgements No. 396, Waldegrave (1987) and No. 541, Ibarria (1991)). The role of the Tribunal is to determine whether, under the circumstances, the Respondent acted within his reasonable discretion. The Tribunal is of the view that the Administration did not use reasonable discretion.

VII. For the foregoing reasons,

(1) The Tribunal orders that the Applicant's case be remanded to the Classification Committee and that her post grading should be reconsidered. (Cf. Judgements No. 597, Colayco (1993) and No. 602, Calder (1993)). In accordance with article 9, paragraph 2 of the Tribunal's Statute, the Tribunal orders the Respondent to pay to the Applicant three months of her net base salary at the rate in effect at the time of her separation from service.

(2) In addition, because of the callous manner in which the Respondent handled the Applicant's case, the Tribunal orders the Respondent to pay the Applicant as compensation the amount of three months' net base salary at the rate in effect at the time of her separation from service.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/793
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 793

Case No. 878: BLOCH

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, Vice-President, presiding; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, on 9 October 1995, Leonce R. Bloch, a former staff member of the United Nations, filed an application, requesting the Tribunal, inter alia:

"...

(i) To hold that the investigation of the Applicant and his suspension ... was precipitous and totally unwarranted ...

(ii) To hold that the investigation of the Applicant and the harsh measures of suspension inflicted on him were motivated by extraneous factors ...

(iii) To hold that the suspension of the Applicant was totally arbitrary and was not based on valid evidence of corruption but rather on a tenuous presumption of guilt and the very unreasonable premise of conspiracy and collusion ...

(iv) To hold that the harsh and unreasonable measures accompanying the implementation of the suspension were totally unjustified and have led to irreparable damage to the personal and professional image and reputation of the Applicant.

...

(vi) To hold that ... the continuation of the suspension until 11 November 1993, which was the date of expiration of his appointment, was totally arbitrary ...

...

(viii) To hold that the non-submission of the charges against the Applicant to the ad hoc Joint Disciplinary Committee, as requested by him, and addressing to him a letter of criticism, after the expiration of his appointment, was in effect a misguided arbitrary disciplinary measure devoid of the elementary principles of due process or justice.

(ix) To hold that the letter of criticism of 17 November 1993 (...) was in effect a slight modification of the letter of 9 July 1993 (...). In essence both had attributed to the Applicant one and the same accusation of misconduct. ...

(x) To order that the Secretary-General formally withdraw from the Applicant's file [the Director of Personnel, Office of Human Resources Management]'s letter of 17 November 1993 (...) which included 'an expression of the Organization's strong disapproval of this conduct on your part' and to address to him a letter informing him that the investigation had been concluded and that it had established no misconduct or irregular action on his part.

...

(xii) To order appropriate compensation to the Applicant for the injury sustained, should the Secretary-General, within thirty days of the notification of the judgement, decide, in the interest of the United Nations, that the Applicant shall be compensated without further action being taken in his case.

(xiii) In any case, to order compensation to the Applicant for the grave injury inflicted on him as a result of the arbitrary measures taken against him, ..."

Whereas the Respondent filed his answer on 2 February 1996;

Whereas the Applicant filed written observations on 14 March 1996;

Whereas the facts in the case are as follows:

The Applicant, a national of the United States of America, is a retired staff member of the United Nations Development Programme. He re-joined the Organization on 20 November 1988, on short-term appointments of varying duration as a Procurement Officer at the P-4 level, in the Field Missions Procurement Section (FMPS), Commercial Purchase and Transportation Service (CPTS), Office of General Services (OGS), until the expiration of his last appointment on 11 November 1993. At that time, the Applicant was a Procurement Officer at the P-4 level in OGS/CPTS/FMPS.

In 1993, a preliminary investigation was conducted into allegations of irregularities in the procurement process, especially with respect to air transportation services for field missions. By a memorandum dated 9 July 1993, the Acting Director of Personnel informed the Applicant of the allegations of misconduct brought against him and the continuing investigation, stating that a "confidential analysis" had "convey[ed] that you were instrumental in the improper award of a UN contract for air transportation services to a favoured contractor. ... In view of the seriousness of the allegations and the interest of the Organization, the Secretary-General has decided to suspend you from duty with pay under staff rule 110.2, effective immediately, without prejudice to your rights. This suspension will have a probable duration of three months." The charges of misconduct are detailed in the attachment to the 9 July 1993 memorandum. They contain, inter alia, allegations that the Applicant had not adhered to proper procurement procedures in the matter under investigation. On 13 August 1993, the Applicant denied the allegations contained in the memorandum

On 19 August 1993, the Applicant requested the Secretary-General to cancel his suspension and to restore "his hitherto unblemished status." He pointed out that he would arrange to make

all his bank accounts and related records available for inspection by the Organization in order to aid in the investigation of the allegations made against him.

On 8 September 1993, the Applicant, together with five other staff members in the same situation, submitted a statement of appeal to the Joint Appeals Board (JAB) requesting "a review of the order of suspension issued against each of them." The other applicants were subsequently referred to an ad hoc joint disciplinary committee, which recommended that no disciplinary action be taken against them. The Secretary-General, however, did not accept this recommendation, and these other staff members appealed to the Tribunal (Judgement No. 744, Eren et al. (1995)).

The JAB adopted its report on the Applicant's request for the suspension of action on 22 September 1993. It concluded as follows:

> "... the Panel felt that it had no alternative but to recommend to the Secretary-General that the request for suspension of action not be granted.
>
> ... the Panel felt that although no irreparable injury has yet been shown, an extension of the suspension beyond the three-month period, effective 9 July 1993, was likely to do so. Therefore, the Panel recommends that no such extension take place."

By a letter dated 6 October 1993, the Under-Secretary-General for Administration and Management informed the Applicant that she had accepted the JAB's recommendation that his request for suspension of action not be granted.

By a letter dated the same day, the Director of Personnel, OHRM, informed the Applicant that his suspension with pay had been extended until 11 November 1993.

On 11 October 1993, the Applicant lodged an appeal with the JAB asking for a suspension of action on the two-month extension of his suspension. The JAB adopted its report on 29 October 1993. It recommended as follows:

"... the Panel decided to recommend to the Secretary-General that the suspension of action not be granted.

...

The Panel ... was concerned at the length of the investigation and its effect on the Appellants and that it could continue indefinitely. The Panel felt that such a course of conduct would ... not be in the best interest of either the Appellants or the Administration."

On 9 November 1993, the Applicant wrote to the Director of Personnel, pointing out that his fixed-term appointment was due to expire on 11 November 1993. He expressed his desire to maintain his status as a staff member, for a "symbolic remuneration", until the final outcome of the pending investigations.

In a reply dated 17 November 1993, the Director of Personnel informed the Applicant as follows:

"Upon a thorough review of the circumstances that led to the award of contract CPTS/CON/113/92, and of your comments of 13 August 1993, I have concluded that there is no convincing evidence that your handling of this case demonstrates a pattern of favouritism towards [the company concerned]. Accordingly, I have decided to close this case.

However, the review revealed that, as the Procurement Officer in charge of this case, your treatment of vendors was insufficiently careful, resulting in a benefit to [the company concerned]. Specifically, you rejected the proposal of certain vendors because, as you stated, they 'lacked details' required in the RFP [Request for Proposal], while [another vendor's proposal], which also lacked requested details, was not rejected on the same grounds. Similarly, you conducted extensive negotiations with [that vendor], which was initially the third lowest proposer overall, and did not do so for the lowest overall proposer.

Unequal treatment of vendors is unacceptable, especially for a Procurement Officer. This letter constitutes an expression of the Organization's strong disapproval of this conduct on your part."

Thereafter, on 7 February 1994, the Applicant lodged an appeal before the JAB against the Administration's conclusion of his wrongdoing. The JAB adopted its report on 23 June 1995. Its findings, conclusions and recommendations read as follows:

> "21. The Panel, having considered the submission of the parties, concluded that the Appellant had not done anything wrong. The Panel further concluded that in spite of a supervisor's right to place on record dissatisfaction with poor performance or conduct, the second and third paragraphs of the letter from the Director of Personnel dated 17 November 1993 were unjustifiable.
>
> 22. The Panel therefore recommends that that letter should be withdrawn from the Appellant's file and replaced with one which would more accurately reflect the findings of the investigation.
>
> 23. The Panel also recommends that the Administration reconsiders the use of staff on short-term appointments in areas of work requiring a high degree of accountability."

On 16 August 1995, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

> "The Secretary-General has conducted an extensive review of your case in the light of the Board's report and of all the documents and events that led to the letter of disapproval sent to you on 17 November 1993, resulting from unequal treatment of vendors in the award of contract CPTS/CON/113/92. The Secretary-General is unable to concur with the Board's findings on the burden of proof, on its weighing of the evidence and on its application of procurement rules and policies.
>
> While a distinction must be drawn between 'lowest proposer' and 'lowest acceptable proposer', determination of such acceptability must stem from technical specifications and requirements appearing in the bid solicitation. In this case, the evidence shows that the lowest bidder has been excluded without any further consultation, on the basis that it was offering less than 10 flights and proposing inadequate seating arrangements, while none of these items were specified as requirements in the initial bid solicitation.

As a result, the Secretary-General does not share the Board's views that your evaluation of bids was 'reasonable'. Nor can he accept the Board's statement that it 'was not convinced' that negotiations with the lowest proposer would have resulted in that vendor's offer meeting all critical requirements (...). This Board's supposition is conjectural, with no evidence on record to sustain it. In this case, exclusion of the lowest bidder on the basis of questionable assumptions of non-compliance was a breach of procurement rules and practices, a violation of fair and equal treatment of vendors and a conduct below the standards expected from UN procurement officers.

For the above reasons, the Secretary-General rejects the Board's recommendation and has decided that the letter of disapproval of 17 November 1993 was warranted."

On 9 October 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Administration's letter of disapproval dated 17 November 1993 was totally arbitrary and unsupportable by any shred of evidence involving the Applicant in any wrongdoing, and was entirely motivated by an attempt to cover up the unwarranted measures which preceded that letter.

2. Both the investigation as well as his suspension were precipitous, unwarranted and influenced by extraneous factors.

Whereas the Respondent's principal contentions are:

1. The letter of disapproval issued to the Applicant constitutes an assessment of his work performance and not a disciplinary measure.

2. The Respondent has broad discretion for determining what constitutes poor performance.

3. The investigation of the allegations against the Applicant was not improperly motivated and the Applicant's suspension was a proper exercise of the Respondent's discretion.

4. The Applicant is not entitled to compensation, since his rights were not violated by the Respondent's decision.

The Tribunal, having deliberated from 5 to 21 November 1996, now pronounces the following judgement:

I. The Applicant served with the United Nations as a permanent staff member for 34 years. He retired in 1981. Between 1988 and 1993, he held a number of short-term appointments with the Field Operations Division and Commercial Purchase and Transportation Service. On his last short-term appointment, the Applicant was employed as Procurement Officer in the Field Missions Procurement Section of the Commercial Purchase and Transportation Service. On 9 July 1993, the Acting Director of Personnel wrote to the Applicant, indicating that the Applicant had been involved in the improper award of a contract for air transportation services to a favoured contractor. The Applicant was informed that, due to the seriousness of the allegations and pursuant to staff rule 110.2, he was to be suspended from duty with pay for a duration of three months.

II. On 6 October 1993, the Applicant was informed by the Director of Personnel that the review of the matter was taking longer than expected and he was to be suspended with pay for a further two months, ending 11 November 1993. On 9 November 1993, the Applicant wrote to the Director of Personnel, noting that his appointment would expire in two days. He requested that his status as a staff member be maintained until the final outcome of the investigation. He added that he would accept a symbolic remuneration of one dollar. Concurrently, the Applicant lodged an appeal to the Joint Appeals Board (JAB) contesting the decision to extend the suspension. The JAB reported that it was "concerned at the length of the

investigation" and its detrimental effect on the Applicant. However, it did not recommend that the Applicant's request for suspension of action be granted.

By a letter dated 17 November 1993, the Director of Personnel informed the Applicant of the results and conclusions of the investigation, specifically: "that there is no convincing evidence that your handling of this demonstrates a pattern of favouritism towards ... Accordingly, I have decided to close this case".

The Applicant appeals from a decision by the Secretary-General to reject the JAB's recommendation that this letter be withdrawn from the Applicant's file and replaced with one which would "more accurately reflect the findings of the investigation".

III. The Tribunal notes that, in addition to the Applicant, other staff members of the United Nations were charged with similar wrongdoings. The staff members, however, were referred to a Joint Disciplinary Committee (JDC) which reviewed the 10 procurement cases in which they were charged with misconduct. The focus of this review was connected to the issue at hand, namely the contract granted to a certain contractor. The JDC considered all the allegations and recommended that no disciplinary measures be taken against these other staff members. However, the Under-Secretary-General for Administration and Management did not accept the JDC's recommendation. Consequently, these staff members filed an application to the Administrative Tribunal.

IV. In Judgement No. 744, Eren et al. (1995), the Tribunal concluded that the applicants were unfairly and improperly treated by the Administration when it penalized them despite the finding of their innocence by the JDC. The Tribunal rescinded the decisions of the Administration to impose disciplinary measures on the staff members and granted them $20,000 each as compensation for harm suffered.

V. Having reviewed the facts of this case, the Tribunal finds that the Respondent violated the Staff Rules and Regulations, as well as the safeguards of due process. The conduct of the Administration seems to have been the result of heavy outside political pressure and of the direct accusation by a business competitor against the contractor selected. The allegations against the staff members were primarily based on suspicion and speculation. In view of the seriousness of the accusations against the Applicant and the ensuing press releases surrounding this controversy, the United Nations should have made every effort to uphold the principle of presumption of innocence. It should have given credence to the Applicant. Had due process been respected, the Applicant would have been heard prior to any action being taken against him. Instead, the Administration presumed that the Applicant was guilty. This led to his suspension from duty and to his being unceremoniously removed from his office in front of other staff members.

VI. The Applicant found himself in an incongruous situation when his suspension was extended beyond the duration of his fixed-term appointment. The Applicant asked to have his status maintained in order to have his case referred to the JDC. However, his employment ended before he was able to plead his case before the JDC. Soon thereafter, he received the 17 November 1993 communication from the Director of Personnel. Had the Applicant been heard by the JDC, he would probably have been exonerated, as were his colleagues.

VII. The Applicant was accused of favouritism regarding Contract No. 113/92. In its report, the ad hoc JDC reviewed this contract and stated as follows:

> "332. ... The Panel therefore considered [the Applicant] to have acted properly in negotiating with [the contractor awarded the contract] after determining that [this contractor] was the lowest acceptable proposer ..."

In addition, the JAB noted that the Administration had neither alleged nor found that any guidelines or procedures had been violated by the Applicant.

VIII. The Tribunal agrees with the ad hoc JDC as well as with the JAB's conclusions. Considering that the investigation of the Applicant did not produce any convincing proof of misconduct by him, the Tribunal concludes that there is no justification for the 17 November 1993 letter to be inserted in the Applicant's file.

IX. For the foregoing reasons, the Tribunal (i) orders that the letter of 17 November 1993 be removed from the Applicant's file; and (ii) orders the Respondent to pay the Applicant the sum of $20,000 as compensation for the harm he suffered.

X All other pleas are rejected.

(Signatures)

Hubert THIERRY
Vice-President, presiding

Francis SPAIN
Member

Mayer GABAY
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/794
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 794

Case No. 879: MUSEIBES

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Hubert Thierry, Vice-President; Mr. Francis Spain;

Whereas, on 25 September 1995, Hasan Mohd Museibes, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application requesting the Tribunal, inter alia, to:

"...

(a) Ask the Respondent to provide the Tribunal with the whole file of my fourth appeal of 22 November 1993, ...

...

(c) Reappoint me [to] my former post of Area Welfare Officer or an equivalent post, ...

(d) Issue a testimonial certificate acknowledging my dedication, achievements and donations when I was AWO [Area Welfare Officer], change the Certificate of Service accordingly, issue and distribute fieldwide a letter of apology to rehabilitate my reputation, ...

(e) Compensate me for the period of separation from work as from 2 October 1993 up till now, according to the last reclassification of Welfare Officers at grade 11 and be given a cheque payable in US dollars ...

(f) Compensate me for the immense financial harm, i.e. withholding my annual increment and transferring me from area to area and from post to another lower post and not allowing me to participate in any training course ...

(g) Compensate me for the immeasurable moral and psychosomatic harm, ...

(h) [Award of legal costs],

(i) Pay me the total of 50,000 US dollars or [the amount] the Tribunal deems proper."

Whereas the Respondent filed his answer on 22 April 1996;

Whereas the Applicant filed written observations on 12 June 1996;

Whereas the Applicant submitted additional written observations on 18 October 1996;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 2 May 1987, as an Area Welfare Officer B, in the Aleppo/Lattakia Area of Syria, at the grade 7, step 1 level, on a temporary indefinite appointment. With effect from 1 August 1990, the Applicant was transferred to the post of Area Welfare Officer, Central (Homs) Area, and with effect from 4 May 1991, to the post of Clerk B, in the Relief and Social Services Department in the Field Office, Damascus, with protected grade and salary. With effect from 1 February 1992, the Applicant was transferred back to the Aleppo Area as an Elementary Teacher, at grade 7. The Applicant resigned, with effect from 1 October 1993.

On 23 April 1991, the Director of UNRWA Affairs (DUA), Syrian Arab Republic (SAR), recorded a decision taken at a meeting between him and the Field Relief and Social Service Officer, to transfer the

Applicant to a G-6 post with grade protection in the Damascus Field Office. In a letter dated 25 April 1991, the Acting Field Administration Officer, SAR, informed the Applicant "the Director has decided to transfer you as from 4 May 1991 from your present post ... to the post of clerk B in the Registration and Eligibility Office with protected grade and salary."

On 2 May 1991, the Applicant requested the DUA to reconsider this decision.

In a letter dated 13 May 1991, the DUA informed the Applicant that his transfer was "the result of an ad hoc investigation" and that he considered it to be "in the interest of the Agency." On 30 May 1991, the Director of Personnel informed the Applicant, on behalf of the Commissioner-General, that "the decision taken by the Field Director is justified and should stand." He offered "to terminate your services in the interests of the Agency" and outlined the entitlements that would consequently accrue to the Applicant.

On 9 June 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

A draft JAB report was completed on 8 November 1991, but was not sent to the Applicant. However, on 21 November 1991, the Secretary of the JAB, UNRWA, informed the Applicant that the chairman of the Panel constituted to hear the Applicant's case had resigned and that a new panel would be constituted. In response to a communication from the JAB dated 6 December 1991, in which the JAB recommended the waiver of applicable time limits, the Officer-in-Charge, UNRWA Headquarters, recommended to the Chairman of the JAB, on 10 January 1992, that:

> "(a) [The Applicant] should be transferred back to Aleppo to the temporary post of Elementary Teacher at grade 7, with priority to be offered the first vacant post that comes up in that area (as an English Teacher, preparatory cycle, at grade 9);

(b) A payment ex gratia of LS 25,000 should be made to [the Applicant] towards any excessive out-of-pocket expenses he may have incurred over and above those which would normally apply in the case of transfers."

On the same date, the Officer-in-Charge, UNRWA Headquarters, transmitted to the Applicant a copy of his communication to the JAB referred to above.

On 14 April 1993, the JAB adopted its report. It recommended that the appeal be dismissed and that "the Administration's decision be upheld with a view to ascertaining that the ex-gratia payment of LS 25,000.00 was adequate and the post offer is properly followed up to finalize reconciling the status of the Appellant under applicable Area Staff Rules and Regulations."

On 13 May 1993, the Commissioner-General transmitted to the Applicant a copy of the JAB report and informed him, inter alia:

"... I accept the recommendation and your appeal, therefore, stands dismissed.

... Finally, the Board has recommended that the question of a post to be offered to you be properly followed up. I will, accordingly, ask the Director of UNRWA Affairs in the Syrian Arab Republic to look into this and advise you of the results in due course."

On 1 September 1993, the Applicant submitted a letter of resignation to the DUA, SAR. The latter accepted the Applicant's resignation on 23 September 1993. He noted that the Applicant's employment would end on 30 September 1993.

On 22 November 1993, the Applicant lodged a further appeal with the JAB. Its findings, evaluation and recommendation read as follows:

"A. The Appellant's objection to the failure of the Field Office Director to answer his letter of resignation dated 1 September 1993 and his letter of protest dated 21 October 1993:

The Board is of the opinion that this does not constitute grounds of appeal under Area staff regulation 11.1(A).

B. The Appellant's objection to the violation of the decisions of the Officer-in-Charge, Headquarters, Vienna by refusing to appoint him to the first vacant post of English Teacher, preparatory cycle, that came in Lattakia sub-Area:

The Board, after a thorough study of the Appellant's file, noted the following:

(1) The decision of the Officer-in-charge, Headquarters, Vienna, as conveyed in his letter dated 10 January 1992 to the Appellant, that the Appellant 'should be transferred back to Aleppo to the temporary post of Elementary Teacher at grade 07, with priority to be offered the first vacant post that comes up in that area (as an English Teacher, preparatory cycle, at grade 09)'

(2) The Appellant continued to serve as Elementary Teacher, grade 07 until September 1993 when he submitted his resignation.

(3) The Appellant alleges that he submitted his resignation under duress and due to the fact that he was unfairly treated by the Administration. The Appellant submits that a vacant post of English Teacher, Preparatory Cycle was advertised in Lattakia sub-Area. He also contends that he submitted his resignation after he was verbally informed by the Area Education Officer and Field Education Officer that his application to the said post was rejected.

(4) In its reply to the appeal, the Administration contends that the post [of] English Teacher was only established on 1 September 1993, the date of the Appellant's resignation and that 'as of 1 August 1993, Lattakia was no longer included with Aleppo in the North Area, but instead was attached to the Central Area.'

(5) In this contest, and based on the decision of the OIC [Officer-in-Charge], HQ [Headquarters] Vienna, the Board is of the opinion that the Appellant should have been given priority to be offered transfer to the first vacant post of English Teacher, Preparatory Cycle, particularly the one that arose in Lattakia Area as:

(a) Lattakia was included with Aleppo Area at the time when the OIC, HQ made his decision, and

(b) The Appellant expressed his desire to take that post by applying for it.

C. The disregard of the Appellant's attendance at work on 1 and 2 October 1993:

The Board here noted the Administration's contention that 'the Appellant was paid for attending at his former place of duty on Saturday, 2 October 1993, notwithstanding that he had resigned effective close of business two days previously on Thursday, 30 September 1993. He was not paid for Friday, 1 October 1993 because that was not a working day, and he had resigned the day before.'

No evidence has been adduced by the Appellant to the contrary of this statement and, therefore, the Board rejects this part of the Appellant's claim.

D. The Appellant's allegation of obstruction and delay, in contravention of paragraph 9 of Area staff rule 111.3, of his second appeal of 7 December 1992 (should be 22 November 1992), and third appeal of 15 April 1993:

The Board here notes that the Appellant's second and third appeals have already been considered by a previous Joint Appeals Board on 12 July 1994. The said Board submitted its recommendations at the time to the Commissioner-General who in turn made his final decisions upon them. The decisions of the Commissioner-General were communicated to the Appellant on 2 and 9 August 1994 respectively.

IV. RECOMMENDATION

16. In view of the foregoing, the Board unanimously makes its recommendation that the Administration complies with the decision of the Officer-in-Charge, HQ., Vienna of 10 January

1992, with a view to reinstating the Appellant in the Agency's service in the post of English Teacher, Preparatory Cycle, grade 09, or any other equivalent post where the Appellant's qualifications are commensurate."

On 14 August 1995, the Commissioner-General transmitted to the Applicant a copy of the JAB report and informed him as follows:

"I refer to the enclosed copy of the report of the Joint Appeals Board on your case, submitted to me under cover of a memorandum from the Chairman, dated 14 July 1995. You will note that the Board has concluded that you should have been offered a transfer to the post of English Teacher, grade 9, in Latakia, effective 1 September 1993. The Board has also recommended that all your other claims be dismissed.

I have carefully reviewed the Board's report. Regarding your contention that you should have been offered a teaching post in Latakia, Latakia was not a part of the same area as Aleppo on 1 September 1993; therefore, the Board's conclusion that the Appellant should have been offered the Latakia post is not well founded. However, in order to bring this matter to a conclusion and in the interest of finality, I have decided to offer you the equivalent of two years' salary at the rate in effect when you resigned in full and final settlement of all the claims you have raised in this appeal. You will be contacted by the Administration regarding the steps necessary to accept this offer."

On 25 September 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent wilfully failed to appoint the Applicant to the post of English Teacher, as required by the letter dated 10 January 1992, from the Officer-in-Charge, Headquarters.

2. The Respondent effected the Applicant's termination for extraneous and improper motives.

Whereas the Respondent's principal contentions are:

1. There were no vacant posts for an English Teacher during the period 10 January 1992 until the Applicant resigned on 1 September 1995.

2. The Applicant is seeking a rehearing of his previous applications to the Tribunal, and relief based on the factual matters raised in those applications. Such matters are res judicata.

The Tribunal, having deliberated from 23 October to 21 November 1996, now pronounces the following judgement:

I. On 25 April 1991, the Acting Field Officer, Syrian Arab Republic (SAR), conveyed to the Applicant the decision of the Field Office Director to transfer the Applicant from his post as Area Welfare Officer in the Central Area to the post of Clerk "B", Registration and Eligibility Officer, with protected grade and salary, with effect from 4 May 1991. The Applicant appealed the decision to transfer him. On 10 January 1992, before the Commissioner-General had made a decision on the Applicant's appeal, the Applicant was informed by the Officer-in-Charge, Headquarters (Vienna), of the decision to transfer him back to Aleppo, to the temporary post of elementary Teacher at grade 7. He was to be offered priority for the first vacant post as an English Teacher, preparatory cycle, at grade 9, that would become available .

II. Subsequently, on 13 May 1993, the Commissioner-General informed the Applicant that, on the recommendation of the Joint Appeals Board (JAB), he had dismissed the appeal. He asked the Director of UNRWA Affairs, SAR, to look into the question of a post

to be offered to the Applicant. On 22 May 1993, the Applicant applied for a transfer to any vacant position as an English Teacher in a preparatory school in Aleppo.

III. However, in a series of letters, beginning on 1st September 1993, the Applicant submitted his resignation, with effect from 30 September 1993. The import of the Applicant's letters was that, because of the animosity he perceived towards him on the part of the Administration, he could not continue to work, and he awaited a decision of the United Nations Administrative Tribunal. On 21 October 1993, the Applicant, in a further letter, complained of a lack of detailed response to his letter of 1 September 1993, and of the failure of the Agency to appoint him to the vacant post of English Teacher in Latakia.

IV. In its report of 31 May 1995, the JAB concluded that the Applicant should have been offered the transfer to the post in Latakia and recommended his reinstatement. The Commissioner-General decided that, as Latakia was not part of the same area as Aleppo when the post was created, the recommendation of the JAB was not well-founded. However, in the interests of finality, he offered "the equivalent of two years' salary, at the rate in effect when [the Applicant] resigned, in full and final settlement of all the claims raised in [the] appeal."

V. The Respondent states that, from 10 January 1992 until the date of the Applicant's notice of resignation of 1 September 1993, there was no vacant post as an English Teacher, preparatory cycle, at Grade 9, in the relevant area. Up to 1 August 1993, Latakia and Aleppo were in the Agency's North Area in SAR. From that date, Latakia was no longer included with Aleppo in the North Area, but, instead, was attached to the Central Area.

VI. In the Tribunal's view, as Latakia and Aleppo were in the North Area at the time that the Officer-in-Charge made his recommendation, priority should have been given to the Applicant for any vacancy that arose in that area. A change effected in the designation of the area, subsequent to the recommendation of the Officer-in-Charge, should not have precluded such priority. Nor should the coincidence of the creation of such a post, on the very day of the Applicant's letter of resignation, in any way negate the recommendation of the Officer-in-Charge.

VII. The Tribunal has considered the other matters raised by the Applicant, i.e., failure of the Administration to respond to the Applicant's correspondence, failure of the Administration to pay the Applicant for working on 1 and 2 October 1993 and delaying the procedures of the Applicant's second and third appeals to the JAB. The Tribunal accepts the Respondent's arguments with respect to these matters. Following the recommendation of the JAB, that the Applicant be given priority for a post as Teacher of English, preparatory cycle, grade 9, the Commissioner-General offered to pay to the Applicant the equivalent of two years' salary at the rate in effect on the date when the Applicant resigned, in full and final settlement of all claims raised in the appeal. The Respondent is willing to pay the amount in Syrian pounds at the exchange rate in effect on 30 September 1993.

VIII. In view of the Tribunal's determination in regard to the conclusion of the Officer-in-Charge, Headquarters, dated 10 January 1992, the Tribunal orders that:

(i) The Applicant be offered priority for the first relevant vacant post to come up in the North Area, SAR, which includes both Aleppo and Latakia.

(ii) In the alternative, the Applicant be paid the equivalent of six months of his net base salary at the rate in effect on the

date of his resignation, in addition to the two years' net base salary offered to him by the Respondent, the amounts to be paid in Syrian pounds, at the exchange rate in effect on 30 September 1993.

IX. The Tribunal makes no further order.

(Signatures)

Samar SEN
President

Hubert THIERRY
Vice-President

Francis SPAIN
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/795
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 795

Case No. 882: EL-SHARKAWI Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, at the request of El-Moetaz El-Sharkawi, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 December 1994, 5 March, 31 May, 31 August and 30 November 1995, the time-limit for the filing of an application to the Tribunal;

Whereas, on 10 November 1995, the Applicant filed an application requesting the Tribunal:

"(a) To direct the Secretary-General to reinstate the Applicant or, should the Secretary-General decline to do so, to pay to the Applicant compensation higher than the compensation recommended by the Joint Appeals Board (...);

(b) To find that in the Applicant's case the Administration has been guilty of abuse of power and to award to the Applicant appropriate compensation on this count as well (...);

(c) To order the Secretary-General to consider the Applicant, as a matter of priority, for future vacancies in the Secretariat for which he is qualified and, in the meantime, to pay the Applicant compensation for the violation of his entitlements under the recommendation of the Joint Appeals Board, which had been accepted by the Secretary-General (...); and

(d) To award to the Applicant compensation also for the damage to his professional reputation and for the emotional suffering which the actions of the Administration have caused to him (...)."

Whereas the Respondent filed his answer on 26 February 1996;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on a three-month short-term contract as an Associate Information Officer, at the P-2 level, in the Department of Public Information (DPI), Information Products Division. Subsequently, he worked as an Independent Contractor with the Publishing Activities Group, serving for eight months on a series of special service agreements, from 30 October 1990 to 30 June 1991. With retroactive effect to 1 August 1991, the Applicant was recruited by the Department of Conference Services (DCS), as a Publishing Officer, on a six-month fixed-term appointment, at the P-2, step II level.

The Applicant was employed as a result of action taken by the Secretary-General in response to a recommendation in 1986, by a group of High Level Inter-Governmental Experts (the Group of 18) to set up a group within DCS to identify UN-oriented books for publication. By a series of fixed-term appointments, the Applicant's initial appointment was extended until 31 December 1992. On 24 June 1992, the Assistant Secretary-General, Office of Human Resources Management (ASG/OHRM), approved the extension of the Applicant's appointment through 31 December 1992, on the understanding that the Applicant would be placed against a post at the P-2 level. The P-3 post against which he had been recruited was to be made available for the 1992 promotion review exercise.

On 21 July 1992, the Administrative Officer, Office of Conference Services (OCS), informed the Chief, Professional Staffing Service, OHRM, that the Applicant would be placed against a post at

the P-2 level. In order to satisfy the terms of the ASG/OHRM's approval, OCS intended to extend the Applicant's contract on a month-to-month basis, until OCS was able to identify a vacant post at the P-2 level.

On 25 November 1992, the External Publications Officer, OCS, wrote to the Director of the Publishing Division, OCS, recommending an extension of the Applicant's appointment "for at least a year". However, on 22 December 1992, the Deputy Executive Officer, OCS, Department of Administration and Management (DAM), requested the Recruitment and Placement Officer, Professional Staffing Service, OHRM, to extend the Applicant's appointment for six months only, through 30 June 1993. On 21 January 1993, the Officer-in-Charge, Professional Staffing Services, OHRM, recommended to the Director of Personnel that extension of the Applicant's appointment be approved only through 31 January 1993. He noted that any subsequent extension of the Applicant's appointment had to be contingent upon certain developments relating to the post and, in any case, the Applicant's appointment being made only on a month to month basis after a break in service of one month. This recommendation was approved by the Director of Personnel.

On 29 January 1993, the Deputy Executive Officer, OCS/DAM, informed the Applicant that although OCS had requested an extension of the Applicant's fixed-term appointment through 30 June 1993, the request had been approved only through 31 January 1993. The Applicant was further informed that his last day of duty would be 29 January 1993. He separated from service on 31 January 1993.

On 2 February 1993, the Director, Publishing Division, OCS, wrote to the Director, OCS, requesting the Applicant's reinstatement for a period of six months, pending the finalization of the necessary recruitment measures. On 5 February 1993, the Director, OCS, requested the Director of Personnel, OHRM, to review the Applicant's situation "with a view to finding an equitable solution that would take into account both the substantive and human aspects

of this issue". On 25 February 1993, the Under Secretary-General, DPI, and the Director, OCS, in a joint memorandum, requested the Director of Personnel to extend the Applicant's appointment on the ground that they had been able to identify one P-2 post "for reassignment" within DPI, while hoping that a P-3 frozen OCS post could be released.

On 29 March 1993, the Applicant requested the Secretary-General to review the administrative decision not to extend his fixed-term appointment. On 10 July 1993, he lodged an appeal with the Joint Appeals Board (JAB). The JAB joined his appeal to that of another staff member in a similar situation. The JAB adopted its report on 12 April 1994. Its considerations, conclusions and recommendations read, in part, as follows:

> "22. The Panel next turned to what it considered to be a crucial issue in this case: whether, despite the fact that their contracts spelled out in the appropriate staff rule 104.12, that this type of appointment carried no expectancy of continued employment after the expiration date, the circumstances surrounding their employment and separation had created such an expectancy.
>
> 23. The Panel examined these circumstances in the light of the relevant jurisprudence of the UNAT [United Nations Administrative Tribunal]. The Panel noted that, in the Tribunal's view, the length of the period served under the appointment and the quality of service rendered were not in themselves sufficient to create an expectancy of continued employment. Disregarding these aspects therefore, the Panel nevertheless found that the repeated intervention by their Department insisting on their continued retention for the purpose of continuing the work on which they had successfully embarked and which was mandated by the Secretary-General's desire to carry out the recommendations of the 'Group of 18', might have created the impression in the minds of the Appellants that their employment would be continued.
>
> 24. This was not unreasonable, despite the fact that they must have been aware of the objections raised by OHRM to such continuation as these objections were not based on their

qualifications for the posts they occupied nor the continuing need for the work they were doing, but on technical and legal considerations, such as the lack of proper authority for their being hired in the first place and the absence of vacant posts against which they could be placed.

25. In view of the fact that these difficulties had been overcome in the past, despite similar objections advanced then, they may have felt that they would be overcome again.

Conclusions and Recommendations

26. In light of these facts, the Panel believes that an expectancy of continued employment was created by the circumstances surrounding their employment and recommends that the Appellants be reinstated or, if there are no posts, be paid compensation equal to 6 months' net base salary at the rate in effect at the time of their separation from service and that the Appellants be considered for future vacancies for which they are qualified.

...

28. In the light of the circumstances of these cases, the Panel offers the following observations: expectancies of continued employment were raised in the two cases before it as a result of administrative confusion between Departments. Steps should be taken to avoid that an expectancy of continued employment should arise from administrative confusion, in circumstances where otherwise objectively no such expectancy could reasonably be presumed."

On 10 August 1994, the Applicant was advised by the Officer-in-Charge, DAM, of the Secretary-General's decision on the JAB's recommendation:

"The Secretary-General has examined your case in the light of the Board's report. He is not in agreement with the belief of the Board that an expectancy of continued employment was created by the circumstances surrounding your employment, namely that 'difficulties had been overcome in the past despite similar objections advanced then, [and that you] may have felt that they would be overcome again'. To the contrary, the Secretary-General has found that the previous difficulties would serve to put you on notice of

potential problems with the extension of your appointment. The Secretary-General is also not in agreement with the Board's recommendation that you be reinstated or paid compensation of 6 months.

However, in the light of all of the circumstances of your case, including the possibility that your appointment might have been extended on a month to month basis, the Secretary-General has decided to pay you one month net base salary at the rate in effect at the time of your separation from service. The Secretary-General is also in agreement that you should be considered for future vacancies for which you are found to be qualified."

On 10 November 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. In view of the circumstances of his case, the Applicant had a legitimate expectation that his contract would be renewed.

2. The Respondent agreed to renew the Applicant's fixed-term appointment if certain conditions were met. However, the Respondent ignored the constructive responses that he received, thereby violating the rights of the Applicant.

3. In failing to renew the Applicant's contract, the Administration was guilty of abuse of power.

Whereas the Respondent's principal contentions are:

1. Making good faith efforts to place a staff member does not give rise to a legal expectation of continuing employment.

2. The decision not to renew the Applicant's fixed-term contract did not constitute abuse of power and was not motivated by extraneous factors.

The Tribunal, having deliberated from 4 to 21 November 1996, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Respondent dated 10 August 1994. That decision rejected a unanimous Joint Appeals Board (JAB) recommendation that the Applicant be reinstated or, alternatively, be paid compensation in the amount of six months' salary. The JAB also recommended that the Applicant be considered for future vacancies for which he might be qualified. The latter recommendation was accepted by the Respondent. The Applicant's claim is that the decision of the Respondent not to extend his contract was an abuse of power. He further requests compensation in an amount greater than the six months' net salary that was recommended by the JAB, as well as compensation for professional and moral damages. The Applicant also asks the Tribunal to order the Respondent to reinstate him. If there are, at present, no suitable vacant posts, he should be treated as a priority candidate for future vacancies.

II. The issue in this case is whether the decision not to renew the Applicant's fixed-term appointment was a valid exercise of the Secretary-General's discretion. The Tribunal's role is to ensure that the discretionary authority of the Secretary-General is not exercised in a manner that violates notions of fairness and justice.

III. The Tribunal notes the Staff Rules which deal with fixed-term contracts. Staff rule 104.12(b) provides that:

> "... The fixed-term appointment does not carry any expectancy of renewal or conversion to any other type of appointment."

In addition, staff rule 109.7(a) provides that:

> "A temporary appointment for a fixed-term shall expire automatically and without prior notice on the expiration date specified in the letter of appointment."

The Applicant also signed a United Nations "Letter of Appointment" which states, inter alia:

> "The Fixed-Term Appointment does not carry any expectancy of renewal or of conversion to any other type of appointment in the Secretariat of the United Nations."

IV. The Applicant served on a series of successive fixed-term appointments for an uninterrupted period of 18 months. On 29 January 1993, the Applicant was informed that his appointment would not be extended. The Applicant claims that he had a legitimate expectancy of renewal under the circumstances. It has been the Tribunal's consistent jurisprudence to hold that a series of successive fixed-term appointments is not sufficient to create a legitimate expectation of continued employment (Judgements No. 305, Jabbour (1983) and No. 427, Raj (1988)); that employment with the Organization ceases on the expiration date of a fixed-term appointment and that a legal expectancy of renewal would not be created by efficient or even by outstanding performance; (Judgements No. 173, Papaleontiou (1973); No. 440, Shankar (1989); No. 496, B. (1990) and No. 506, Bhandari (1991)). The Tribunal has also held that any factor that may have misled the staff member into believing that his or her contract of employment might be extended or converted into more permanent employment must be weighed to determine whether it was the Respondent who was responsible for causing the misapprehension (cf. Judgements No. 142, Bhattacharyya (1971) and No. 242, Klee (1979)).

V. In the case before it, the Tribunal finds several actions by the Respondent that may have misled the Applicant into believing that his contract would be renewed. Firstly, the Applicant was hired to work on an undertaking which was considered a long-term project of the United Nations. Secondly, the Applicant received

repeated assurances from his supervisor that his presence was essential to the success of the project. Thirdly, there were repeated interventions by the substantive department, insisting on the Applicant's continued employment in order to finalize the project on which he was working. These factors together may have created the reasonable impression that the Applicant's employment would be continued. Therefore, based on these circumstances, the Tribunal agrees with the JAB's recommendation that the Applicant be compensated.

VI. The Applicant also claims that the non-renewal of his appointment constituted abuse of power, and was motivated by prejudice or other extraneous factors. The Tribunal has consistently held that an Applicant, when alleging prejudice or abuse of power, has the burden of proving these grounds by compelling evidence (Judgements No. 312, Roberts (1983) and No. 470, Kumar (1989)). Therefore, it is clearly incumbent upon the Applicant to prove these allegations. Having reviewed the material before it, the Tribunal concludes that the Applicant has failed so to prove.

VII. For the foregoing reasons, the Tribunal:

(1) Orders the Respondent to pay the Applicant compensation equal to six months' net base salary at the rate in effect at the time of his separation from service, in addition to the compensation awarded by the Secretary-General in his decision of 10 August 1994.

(2) Orders that the Applicant should be considered for vacancies suitable for his qualifications and experience.

(3) Rejects all other pleas.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Francis SPAIN
Member

Mayer GABAY
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/796
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 796

Cases No. 883: XU
No. 888: YUAN
No. 889: LIN
No. 890: LI
No. 891: YIN
No. 892: SHEN
No. 907: JIA
No. 911: PEI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, Vice-President, presiding; Mr. Francis Spain; Ms. Deborah Taylor Ashford;

Whereas, on 31 October 1995, Jin Xu, a former staff member of the United Nations, filed an application containing, inter alia, the following pleas, which were also contained in the applications filed on the same day by the Applicants Yuan, Lin, Li, Yin and Shen, and in the applications filed later by Jia and Pei:

"(a) That the recommendation of the JAB to waive the time-limits [specified in staff rule 111.2(a) for making requests for administrative review] is well-founded and that the Secretary-General thus should be required to accept the recommendation;
(b) That the Applicant should be considered for a career appointment;
(c) That, should the Secretary-General decide not to grant him a career appointment the Applicant should, in lieu of that appointment, be paid three years' net base salary."

The Applicant Xu's application contained the following additional plea:

"(d) That, in the alternative, the Tribunal should require that the Organization facilitate his reinstatement in the United Nations or a specialized agency, as was recommended in the 'Han' case (Administrative Tribunal Judgement No. 527, para. XIX) as soon as possible."

Whereas the Respondent filed his answer on 10 June 1996;

Whereas the Applicant Xu filed written observations on 20 September 1996;

Whereas, on 31 October 1995, Dexin Yuan, a former staff member of the United Nations, filed an application containing the pleas cited above and the following additional plea:

"(d) Require that the Applicant be compensated for the period in which he was not employed by the UN, and thereafter for the difference between the compensation that he has earned, and that he would have earned had he been considered for career appointment in December 1989."

Whereas the Respondent filed his answer on 25 June 1996;

Whereas the Applicant Yuan filed written observations on 20 September 1996;

Whereas, on 31 October 1995, Xiao-jia Lin, a staff member of the United Nations, filed an application containing the pleas cited above and the following additional plea:

"(d) That, in the alternative, the Tribunal should require that the Applicant be compensated for the period in which she was not employed by the UN, and thereafter for the difference between the compensation that she has earned, and that she would have earned had she been considered for career appointment in June 1989."

Whereas the Respondent filed his answer on 28 June 1996;

Whereas the Applicant Lin filed written observations on 20 September 1996;

Whereas, on 31 October 1995, Ning Li, a former staff member of the United Nations, filed an application containing the pleas cited above and the following additional pleas:

> "(b) That the JAB was incorrect in finding that the secondment of the Applicant was valid, since his association with the Chinese Foreign Ministry was only pending his appointment to the UN, and since the Applicant had sent a letter to the Chinese mission to ensure that even the appearance of secondment would not continue after June 1989: thus there was no genuine secondment from the Government at the time the Applicant should have been considered for a career appointment;
>
> ...
>
> (e) That, in the alternative, the Tribunal should require that the Applicant be compensated for the period in which he was not employed by the UN, and thereafter for the difference between the compensation that he has earned, and that he would have earned had he been considered for career appointment in August 1989;
>
> (f) That, in the alternative, the Tribunal should require that the Applicant be compensated for at least the one year recommended by the JAB."

Whereas the Respondent filed his answer on 12 August 1996;

Whereas the Applicant Li filed written observations on 20 September 1996;

Whereas, on 31 October 1995, Xiaoning Yin, a staff member of the United Nations, filed an application containing the pleas cited above and the following additional plea:

> "(d) That, in the alternative, the Tribunal should require that the Applicant be compensated for the period in which he was not employed by the UN, and thereafter for the difference between the compensation that he has earned, and that he would have earned had he been considered for career appointment in December 1989."

Whereas the Respondent filed his answer on 8 August 1996;

Whereas the Applicant Yin filed written observations on 20 September 1996;

Whereas, on 31 October 1995, Guan-rong Shen, a former staff member of the United Nations, filed an application containing the pleas cited above and the following additional plea:

> "(d) That, in the alternative, the Tribunal should require that the Applicant be compensated for the period in which he was not employed by the UN, and thereafter for the difference between the compensation that he has earned, and that he would have earned had he been considered for career appointment in August 1989."

Whereas the Respondent filed his answer on 3 July 1996;

Whereas the Applicant Shen filed written observations on 20 September 1996;

Whereas, on 31 January 1996, Yunqi Jia, a staff member of the United Nations, filed an application containing the pleas cited above and the following additional plea:

> "(d) That, in the alternative, the Tribunal should require that the Applicant be compensated for the period in which he was not employed by the UN, and thereafter for the difference between the compensation that he has earned, and that he would have earned had he been considered for career appointment in December 1989."

Whereas the Respondent filed his answer on 5 August 1996;

Whereas the Applicant Jia filed written observations on 20 September 1996;

Whereas, on 31 January 1996, Shu Pei, a former staff member of the United Nations, filed an application containing the pleas cited above and the following additional plea:

"(d) That, in the alternative, the Tribunal should require that the Applicant be compensated for the period in which he was not employed by the UN, and thereafter for the difference between the compensation that he has earned, and that he would have earned had he been considered for career appointment in December 1989."

Whereas the Respondent filed his answer on 18 June 1996;

Whereas the Applicant Pei filed written observations on 20 September 1996;

Whereas the facts in all the cases are as follows:

The Applicant Xu entered the service of the Organization on 25 January 1985, on a five-year fixed-term appointment as an Associate Translator at the P-2, step I level. His Letter of Appointment carries the notation: "On secondment from the Government of China".

He was separated on 24 January 1990, the expiration date of his fixed-term appointment. Thereafter, he was employed on a series of short-term appointments of varying duration from 23 September 1991 through 13 May 1995.

The Applicant Yuan entered the service of the Organization on 21 May 1984, on a five-year fixed-term appointment as an Associate Translator at the P-2, step IV level. His Letter of Appointment does not carry a notation stating that he was on secondment from the Government of China.

He was separated on 20 May 1989, the expiration date of his fixed-term appointment. Thereafter, he was employed on a series of short-term appointments of varying duration from 12 August 1991 through 31 August 1996.

The Applicant Lin entered the service of the Organization on 19 June 1984, on a five-year fixed-term appointment as an Associate

Translator at the P-2, step I level. Her Letter of Appointment carries the notation: "On secondment from the Government of China".

She was separated on 18 June 1989, the expiration date of her fixed-term appointment. Thereafter, she was employed on a series of short-term appointments of varying duration from 28 October 1991 through 28 January 1997.

The Applicant Li served on short-term appointments at the Economic and Social Commission for Asia and the Pacific (ESCAP) in 1983 and 1984. On 31 August 1984, the Applicant was granted a five-year fixed-term appointment as an Associate Translator in ESCAP at the P-2, step I level. His Letter of Appointment does not contain any mention of secondment. However, the Personnel Action issued at that time carries the notation: "Staff member on secondment from the P.R.C. [People's Republic of China] Govt."

He was separated on 30 August 1989, the expiration date of his fixed-term appointment. Since his separation, he has served the Organization on a series of short-term appointments of varying duration from 21 May 1992 through 10 September 1993.

The Applicant Yin entered the service of the Organization on 24 July 1984, on a five-year fixed-term appointment as an Associate Translator at the P-2, step IV level. His Letter of Appointment carries the notation: "On secondment from the Government of China".

His appointment was extended for five months and six days, and he was separated at its expiration on 29 December 1989. Thereafter, he was employed on a series of short-term appointments of varying duration from 23 August 1991 through 1 February 1994. On 23 April 1994, the Applicant Yin received a fixed-term appointment through 31 December 1995, which was extended through 31 December 1996.

The Applicant Shen entered the service of the Organization on 7 August 1984, on a five-year fixed-term appointment as an Associate Interpreter at the P-2, step I level. His Letter of Appointment carries the notation: "On secondment from the Government of China".

He was separated on 6 August 1989, the expiration date of his appointment. Thereafter, he has worked freelance for the Interpretation Service on a series of WAE (When Actually Employed) and short-term contracts of varying duration from 12 January 1994 through 8 November 1996.

The Applicant Jia entered the service of the Organization on 24 July 1984, on a five-year fixed-term appointment as an Associate Translator at the P-2, step IV level. His Letter of Appointment carries the notation: "On secondment from the Government of China".

On 24 July 1989, the Applicant's appointment was extended for five months and six days and he was separated on 29 December 1989. Thereafter, he was employed on a series of short-term appointments of varying duration from 23 September 1991 through 30 September 1994. The Applicant was reemployed on 1 June 1995, on a two-year fixed-term appointment as a Terminologist, Chinese Language Service.

The Applicant Pei entered the service of the Organization on 21 May 1984, on a five-year fixed-term appointment as an Associate Translator at the P-2, step IV level. His Letter of Appointment does not contain any mention of secondment.

He was separated on 20 May 1989, the expiration date of his fixed-term appointment. Thereafter, he was employed on a series of short-term appointments of varying duration from 23 September 1991 through 24 December 1996.

On 20 September 1990, ten former Chinese language staff members, including the Applicants, wrote to the Secretary-General, alleging denial of due process and requesting reinstatement. By a

letter dated 7 November 1990, the Assistant Secretary-General for Human Resources Management informed the Applicants that their "allegations and complaints" were not receivable because they were time-barred.

On 4, 5 and 20 March 1991 respectively, the Applicants Xu, Yuan and Yin lodged appeals with the Joint Appeals Board (JAB). The Applicants Lin and Li lodged appeals with the JAB on 28 October and the Applicant Shen lodged an appeal on 30 October 1991. The Applicants Jia and Pei lodged appeals with the JAB on 30 May and 8 October 1991, respectively.

The JAB adopted its reports in respect of the Applicants Xu, Yuan, Yin, Jia and Pei on 6 December 1991 and in respect of the Applicants Lin, Li and Shen on 8 May 1992. Its considerations and recommendations in each of these cases read as follows:

> "Considerations
>
> 10. ... The Panel felt that the text of staff rule 111.2(e) gave it the discretion to waive any of the time-limits specified in paragraphs (a) and (b) of the Rule, including that specified for the request to the Secretary-General for an administrative review. This was also the position of the UNAT [United Nations Administrative Tribunal] in Judgement Nos. 260 and 215 (Denis), in particular paragraphs XV, XVI and XXIV through XXX of the latter, as well as in XIII of Judgement No. 527 (Han). The Panel concluded, therefore, that if it were to consider that there were the 'exceptional circumstances' required in staff rule 111.2(e), it could waive the time-limit set for the request to the Secretary-General, as well as that set for an appeal to the JAB itself.
>
> 11. The Panel had no doubt that Respondent is correct in arguing that the decision by the Secretary-General to strictly enforce the time-limit in this case was properly made and, therefore, should not lightly be set aside. The Panel noted that Respondent acknowledges (...) that the 'staff thought to be on secondment constituted a group by which by definition, was in an exceptional situation', while arguing that Appellant's situation was not exceptional within that group. No doubt, Applicants Qiu, Zhou and Yao (Judgement No. 482) met the time-limits; they were well advised to do so. Appellant, and a number of others

separated from the Organization prior to the date of UNAT Judgement No. 482, did not. The Panel is well aware of the dictum: 'Ignorance of the law is no excuse'; it is also familiar with the concepts 'rule of law' and of 'due process'. The Panel is prepared to accept that Appellant was less familiar with these legal norms, and that it would be reasonable to expect that Appellant would only proceed with the appeal process when he was aware that he had probable cause of action. The Panel notes, in this connection, that the Secretary-General was in a similar state of ignorance, as reflected in the remark in paragraph 27 of Respondent's statement: 'For years, the Organization, in good faith, had worked on the assumption that a great number of its staff were on valid secondment from their Government and acted accordingly.' Respondent goes on to say that UNAT Judgement No. 482 created a problem of considerable dimensions for the Secretary-General. The Panel, therefore, concludes that the circumstances so described were exceptional and that it would be justified in waiving the time-limit.

12. The Panel observes, however, that Appellant acted promptly once he was aware that he did, indeed, have a probable cause of action. The Panel was informed that Tribunal judgements are not given general distribution, and that UNAT Judgement No. 482 was put in limited distribution at Headquarters on 9 August 1990. Appellant could not reasonably be expected to have been informed of the judgement until some time after that date. The letter to the Secretary-General signed by Appellant and nine others was dated 20 September 1990 and was received in OHRM [Office of Human Resources Management] on 5 October 1990, within the established time-limit for requests for administrative review.

13. The Panel then addressed the matter of the time-limit specified in staff rule 111.2(a)(i). It was aware that Panels of the JAB had not always felt bound to take a narrow view of this provision, but tended to consider whether, in the circumstances of a given case under review, equity would be better served by avoiding a strict application of the time-limit. They had, therefore, on a number of occasions waived the time-limit in cases they viewed as exceptional. The Panel noted that the letter of 7 November 1990 to Appellant from the ASG/OHRM was couched in terms which might lead Appellant to conclude that the appeal time-limit was not a separate matter at issue. The Panel was struck by the failure of the letter to notify Appellant, as is the normal practice in such letters, of his right to appeal and of the relevant rules and time-limits. By the time (January 1991)

Appellant was able to avail himself of counsel who might have advised him otherwise, the time-limit had passed. Moreover, the Administrative Tribunal, in Judgement No. 527 (Han), having decided to reject Applicant's pleas, nevertheless noted (para. XIX) the 'exceptional circumstances of the case' and its similarity to that of Applicants Qiu, Zhou and Yao and made a strong recommendation in favour of Applicant Han. The Panel feels justified in following the lead of the Tribunal in this case. It decided, therefore, that the appeal was receivable and proceeded to consider it on its merits.

14. The Panel, having taken note of paragraph 4 of Respondent's brief, considered that the memorandum of 24 January 1992 from the Secretary, JAB, to the Chief, Administrative Review Unit (ARU), was an accurate summary of the rights and responsibilities of the parties and of the Panel as defined in the Staff Rules and the Rules of Procedure and Guidelines of the Joint Appeals Board at Headquarters. The Panel had no doubt that it had the absolute right under the rules to consider the appeal solely on the material before it. It felt it advisable explicitly to state herein its conviction that it was justified in doing so.

15. The Panel noted that Respondent made no comment or objection to Appellant's statement of facts. The facts are, therefore, not in dispute. Given Appellant's PERs and his current UN employment, neither is his competence. The fact that another person proposed by the Chinese government was recruited to the post he vacated establishes that a post was available against which he could have been extended or given a career appointment. Appellant was not reviewed at all for a career appointment much less given the careful consideration called for the General Assembly resolution 37/126 and 38/232. Nor was he, as an admittedly qualified serving staff member, accorded the 'fullest regard' called for in staff regulation 4.4. In every respect but one, Appellant's situation was precisely that of Applicants Qiu, Zhou and Yao. They were recommended for career appointments by their immediate supervisor, he was not. Consistent with UNAT Judgement No. 482, in particular paragraph XLI, the Panel concluded that the difference is not significant.

Recommendations

16. The Panel recommends that:

(a) Appellant be granted a career appointment as from [25 January 1990], and be paid salary and allowances retroactive to that date, less whatever he may have received as a short-term appointee; and

(b) Appellant be paid three years' net base salary, should the Secretary-General decide not to grant him a career appointment.

17. The Panel makes no other recommendation with respect to this appeal."

On 20 and 28 January and 4 June 1992, the Secretary-General transmitted a copy of the JAB report to the Applicants and informed them as follows:

"The Secretary-General has re-examined your case in the light of the Board's report. He has decided not to accept its recommendations.

The Secretary-General's decision is based on the following considerations:

(a) That there can be no question that the contested decision was taken in accordance with the policy established by the Secretary-General for the application of Judgement No. 482 to similarly situated staff;

(b) That this policy was fully justified. A great number of serving staff were directly affected by Judgement No. 482 thus creating a problem of considerable budgetary and human dimensions. The policy in question was designed to provide a general solution which could apply fairly to similarly situated staff and could be effectively implemented. While it would have been possible to limit the application of the new policy to staff members in service at the time Judgement 482 was rendered, the Secretary-General opted for a wider application. Some time-limit had to be established since it was obviously impossible to give consideration for employment and provide a post to the hundreds of former staff members previously thought to have been on valid secondment who had, in most cases, returned to Government service. The only time-limit which could not be seen as arbitrary, and which would take into account the rights of the individuals involved as well as the limited number of available posts, was to use as a cut-off date the time-limit provided by the Staff Rules themselves;

(c) That procedures used in good faith for years by the Secretary-General cannot now be retroactively assessed and found invalid when no timely appeal was filed;

(d) that the Board committed a violation of due process in proceeding to the merits of the appeal without giving the Respondent the chance to comment on your allegations; [This paragraph only in the letters to Applicants Xu, Yuan, Yin, Jia and Pei.]

(e) That resolution 37/126 does not establish a right to a career appointment irrespective of whether there is an available post or whether the former staff member's services are needed. In this connection it should be noted that there are far too few available posts to re-employ all former staff who were separated at the expiration of their fixed term appointments. ..."

On 31 October 1995 and 31 January 1996, the Applicants filed with the Tribunal the applications referred to earlier.

Whereas the Applicants' principal contentions are:

1. Due to the exceptional circumstances, the time-limit for requesting review of the decision to let the Applicants' fixed-term appointments expire after five years of service, without consideration for a career appointment, should have been waived by the Secretary-General, in the exercise of his discretion.

2. If the waiver of the above-referenced time-limit is granted, the Applicants should be given consideration for career appointments in the Organization or one of its agencies.

Whereas the Respondent's principal contentions are:

1. Staff rule 111.2(a) specifies time-limits for lodging appeals against administrative decisions.

2. The Applicants' request for a review of the contested decisions did not respect the applicable time-limit.

3. The Secretary-General's decision to apply the time-limit was a reasonable exercise of his discretion.

4. The Applicants have now been given every reasonable consideration for career appointments.

5. The Secretary-General is not obliged to accept recommendations of the JAB.

The Tribunal, having deliberated from 21 October to 21 November 1996, now pronounces the following judgement:

I. The issue before the Tribunal is whether the Respondent properly exercised his discretion in finding the Applicants' appeals time-barred. As the facts and law with respect to this issue are the same in each of the Applicant's appeals, the Tribunal joins the applications and decides them in this one judgement.

II. The Applicants, all nationals of the People's Republic of China at the time of their appointment, separated from UN service prior to Judgement No. 482, Qiu, Zhou and Yao, rendered on 25 May 1990. When the Applicants, all but two of whom had been on secondment from the Government of the People's Republic of China, became aware of this Judgement, they submitted a request for review of the decision to let their fixed-term appointments expire after five years of service, without consideration for a career appointment. This request for review was submitted on 20 September 1990. On 7 November 1990, the Applicants were informed by the Respondent that the request was time-barred. The Joint Appeals Board (JAB) waived the time bar and considered the substantive merits of the applications. The Secretary-General, on the basis of the time bar, rejected the JAB's recommendations.

III. Judgement No. 482, relating to the validity of secondment practices, affected a large number of staff members whose terms of employment, in accordance with the Judgement, did not comply with

the conditions set forth therein for valid secondment. Yet previously, these staff members had been thought by the Respondent to be on valid secondment. Consequently, their governments had played a role in decisions relating to their continued employment with the United Nations. Following Judgement No. 482, with regard to staff members not validly on secondment, decisions relating to continued employment had to be made independently by the Respondent.

IV. In response to Judgement No. 482, the Respondent established a Joint Review Group to ensure that staff previously thought to be on secondment received reasonable consideration for career appointment. However, with regard to staff members who had separated from service, the Respondent included in this review only those who had submitted requests for review within the two-month period set forth in staff rule 111.2(a). All of the Applicants had separated from service more than two months prior to Judgement No. 482, but unlike the applicants in that Judgement, none of them had initiated appeal proceedings relating to their separation prior to Judgement No. 482. In fact, the Applicant Xu separated on 24 January 1990, the Applicant Yuan separated on 20 May 1989, the Applicant Lin separated on 18 June 1989, the Applicant Li separated on 30 August 1989, the Applicant Yin separated on 29 December 1989, the Applicant Shen separated on 6 August 1989, the Applicant Jia separated on 29 December 1989, and the Applicant Pei separated on 20 May 1989. The initiation of their proceedings in September 1990 was a direct result of Judgement No. 482 itself, which led the Applicants to believe that procedures for the administration of justice within the United Nations might provide an effective avenue of recourse for them.

V. Staff rule 111.2(e) provides that "an appeal shall not be receivable unless the time-limits specified in paragraph (a) or (b) above have been met or have been waived, in exceptional

circumstances, by the panel constituted for the appeal". In accordance with this rule, the JAB has the authority to waive the time-limits in "exceptional circumstances" and consider an appeal on its merits, as it did, in the case of the Applicants. However, in this case, the Secretary-General did not agree with or accept the JAB's finding that exceptional circumstances justified a waiver of the time-limits.

VI. The exceptional circumstances identified by the JAB are general circumstances relating to secondment, rather than individual circumstances relating particularly to the Applicants. The JAB was prepared to accept that "it would be reasonable to expect that the [Applicants] would only proceed with the appeal process [when they] were aware that [they] had a probable cause of action". The Applicants' claims are, in essence, that the appeal process was futile prior to Judgement 482. Yet Judgement No. 482 itself belies this assertion.

VII. The jurisprudence of the Tribunal demonstrates that "any circumstances beyond the control of the Applicant which prevented the staff member from submitting a request for review and filing of an appeal in time may be deemed exceptional circumstances." (Judgements No. 372, Kayigamba (1986) and No. 713, Piquilloud (1995)). The rendering of a subsequent judgement cannot be deemed exceptional circumstances in accordance with this logic. The JAB correctly noted that the Applicants Qiu, Zhou and Yao met the time-limits set forth in the rules, as did a number of other former staff members who had initiated proceedings following their separation and prior to Judgement No. 482.

VIII. By necessity, the scope of Tribunal judgements relating to matters of broad application beyond particular applicants is primarily prospective in nature. In effect, the Applicants seek

retroactive implementation of Judgement 482, and the Respondent rightly points out that any time-limit other than that set forth in the staff rules would be arbitrary. The Tribunal considers that the time-limit set by the Respondent in his response to Judgement No. 482 was a reasonable exercise of discretion and has so held in Judgement No. 527, Han (1991). In that case, too, the applicant's appeal was apparently motivated by Judgement No. 482.

IX. The establishment of a reasonable time-limit for the implementation of Judgement 482 does not preclude the presence of exceptional circumstances justifying a waiver of the time-limit, as the Tribunal held in Judgement No. 713, Piquilloud (1995). In that case, however, the Applicant had already initiated efforts to pursue legal recourse following her separation from service and prior to Judgement No. 482. Moreover, she was hindered by the negligence of her counsel under circumstances that were beyond her control. The Tribunal held, in this regard, that "she was prevented from presenting her request in a timely manner ..., partly because of the negligence of her counsel ..." (cf. paragraph IV). The Tribunal's holding in Piquilloud was based on the Respondent's failure even to consider whether the particular circumstances of the applicant might be exceptional and justify a waiver of the time bar. There is no evidence in the cases presently before the Tribunal to suggest that the Applicants were prevented from filing appeals in time by anything other than failing to comply with staff rule 111.2 (a).

X. The Applicants also contend that they did not appeal because of their having been influenced by their supervisors and other members of the Administration who advised them of the futility of an appeal. As in Han, "the Tribunal can only hope that the supervisor in question will make every effort to facilitate the Applicant's reinstatement in the international civil service." (Paragraph XVII). In this regard, the Tribunal notes that some of the Applicants have

been reappointed on a fixed-term basis and that all of the Applicants have served on short-term appointments since their separation. The Tribunal particularly encourages this effort by the Respondent to address the difficult situation of the Applicants, in the light of their failure to avail themselves of the legal recourse which was available to other staff members who were still in service or had already filed timely appeals when Judgement No. 482 was rendered.

XI. For the foregoing reasons, the Tribunal rejects the applications in their entirety.

(Signatures)

Hubert THIERRY
Vice-President, presiding

Francis SPAIN
Member

Deborah Taylor ASHFORD
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary